REMITTITUR.

SUPREME COURT OF THE UNITED STATES.

No. ~~243~~.48

HORACE B. CLAFLIN, PLAINTIFF IN ERROR,

vs.

JULIUS HOUSEMAN, ASSIGNEE IN BANKRUPTCY OF D. B. COMSTOCK AND VAN E. YOUNG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED SEPTEMBER 11, 1874.

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INDEX.

	Original.	Print.
Clerk's certificate	1	1
Writ of error	2	1
Citation	4	2
Service	5	2
Judgment of the court of appeals	8	3
Proceedings in supreme court	9	3
Final judgment	22	8

1 Supreme Court of the United States.

HORACE B. CLAFLIN, PLFF. IN ERROR,
agst.
JULIUS HOUSEMAN, ASSIGNEE IN BANKRUPTCY,
deft. in error.

In obedience to the writ of error annexed hereto, issued out of the Supreme Court of the United States on the twenty-second day of August, in the year of our Lord one thousand eight hundred and seventy-four, the annexed transcript of the record of this court, with copies of all papers and proceedings in the above suit filed and remaining of record in this court, are hereby certified and sent to the said Supreme Court of the United States as in said writ directed.

Given under my hand and official seal this fifth day of September, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] GEORGE G. HERMAN,
Clerk of the Supreme Court of the State of New York,
in and for the County of Kings.

2 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the justices of the supreme court of the State of New York, in the second department, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court on remittitur from the court of appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Julius Houseman, assignee in bankruptcy, plaintiff, and Horace B. Claflin, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of
3 the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Horace B. Claflin, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable M. R. Waite, Chief-Justice of the said Su-

preme Court, the twenty-second day of August, in the year of our Lord one thousand eight hundred and seventy-four.

Issued , 187 .

[SEAL.]

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States for the South. Dist. of New York.

Allowed by—

J. F. BARNARD,
Presiding Justice Supreme Court New York, Second Department.

AUG'T 21, 1874.

(Indorsed:) U. S. Supreme Court. Horace B. Claflin, plff. in error, agt. Julius Houseman, assignee in bankruptcy, deft. in error. Writ of error. Arnoux, Ritch, & Woodford, attys. for plff. Filed Sept. 4, 1874.

4 The United States of America to Julius Houseman, assignee in bankruptcy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, in and for the county of Kings in said State, wherein Horace B. Claflin is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Joseph F. Barnard, presiding justice of the supreme court of the State of New York, 2d department, this 21st day of August, in the year of our Lord one thousand eight hundred and seventy-four.

J. F. BARNARD.

5 Due and timely service of a copy of the within citation is hereby admitted for the defendant in error.

New York, September 1, 1874.

WM. RUSSELL,
Atty. for Deft. in Error.

(Indorsed:) U. S. Supreme Court. Horace B. Claflin, plff. in error, agt. Julius Houseman, assignee in bankruptcy, deft. in error. Citation. Arnoux, Ritch & Woodford, attys. for plff. Filed, Sep. 4, 1874.

6 Court of Appeals State of New York, ss:

Pleas in the court of appeals held at the capitol in the city of Albany, on the 19th day of June, in the year of our Lord one thousand eight hundred and seventy-four, before the judges of this court.

Witness the Hon. Sanford E. Church, chief judge presiding.

E. O. PERRIN, *Clerk.*

Remittitur, July 8, 1874.

7 JULIUS HOUSEMAN, ASSIGNEE, &C., RESPT.,
against
HORACE B. CLAFLIN, APPLT.

Be it remembered that on the 9th day of May, in the year of our Lord one thousand eight hundred & seventy-four, Horace B. Claflin,

the appellant in this action, came here into the court of appeals, by Arnoux, Ritch & Woodford, his attorneys, and filed in said court a notice of appeal & return thereto from the judgment of the general term of the supreme court, and Julius Houseman, ass., &c., the respondent in said action, afterward appeared in said court of appeals, by William Russell, his attorney, which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, this cause having been submitted by the counsel for the respective parties, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and
8 it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed with costs as aforesaid, & stand in full force, strength, & effect.

And hereupon as well the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made & provided, to be enforced according to law, & which record now remains in the said supreme court before the justices thereof, &c.

E. O. PERRIN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 8, 1874.

I hereby certify that the preceding record contains a correct transcript of the proceed'gs in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] E. O. PERRIN, *Clerk.*

9 *Summons for relief.*

New York supreme court, county of Kings.

JULIUS HOUSEMAN, ASSIGNEE OF DAVID B. Comstock and Van E. Young, plaintiff, *agst.* HORACE B. CLAFLIN, DEFENDANT. } (Com. not served.)

To the defendant:

You are hereby summoned and required to answer the complaint in this action which will be filed in the office of the clerk of the county of Kings, at the court-house in the city of Brooklyn, and to serve a copy of your answer to the said complaint on the subscriber, at his office, Nos. 134 and 136 Grand street, in the city of New York, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated May 14, 1872.

WILLIAM RUSSELL,
Plaintiff's Attorney.

10 New York supreme court, county of Kings.

JULIUS HOUSEMAN, ASSIGNEE OF DAVID B. Comstock and Van E. Young, plaintiff,
agst.
HORACE B. CLAFLIN, DEFENDANT.

The plaintiff, by William Russell, his attorney, complaining of the defendant, alleges—

That he is a resident of Grand Rapids, in the State of Michigan, and is the assignee in bankruptcy of David B. Comstock and Van E. Young, bankrupts, duly adjudged and declared such by the district court of the United States for the western district of Michigan.

That the defendant is a resident of the city of Brooklyn, in the State of New York.

That, as plaintiff is informed and believes, the said David B. Comstock and Van E. Young were, on and before the second day of March, one thousand eight hundred and seventy, indebted to the defendant in the sum of eighteen hundred and sixty-two dollars and ninety-two cents, besides interest; and that on the said second day of March,

11 one thousand eight hundred and seventy, the defendant commenced an action against the said David B. Comstock and Van E. Young, in the circuit of the United States for the sixth circuit and western district of Michigan, to recover the said sum of eighteen hundred and sixty-two dollars and ninety-two cents, besides interest, being the amount of three certain promissory notes then held and owned by the said defendant.

That at and before the time of the commencement of the said action the said David B. Comstock and Van E. Young were insolvent, or in contemplation of insolvency; and on the thirty-first day of March, eighteen hundred and seventy, and after the commencement of the said action, with intent to give defendant a preference over others of their creditors, paid, on account of the said claim, to the said defendant or his agent or attorney, the sum of four hundred dollars.

That on the nineteenth day of May, eighteen hundred and seventy, the said David B. Comstock and Van E. Young, being insolvent or in contemplation of insolvency, as aforesaid, and with the intent to give the defendant a preference over others of their creditors, suffered the said defendant to obtain judgment by default for the sum of fifteen hundred and thirty-five dollars and fifty-seven cents, damages and costs; and judgment was, on the said nineteenth day of May, one thousand eight hundred and seventy, duly entered therefor.

That on the second day of June, one thousand eight hundred and seventy, the amount of the said judgment was collected by the marshal, and paid to the said defendant or his attorney.

That subsequently, and on the thirtieth day of July, one thou-

12 sand eight hundred and seventy, certain creditors of the said David B. Comstock and Van E. Young filed a petition in bankruptcy against them, and they were, on the eighteenth day of August, one thousand eight hundred and seventy, adjudicated bankrupts, according to the provisions of the bankrupt law, thus making defendant a preferred creditor.

That four months did not elapse between the entry of judgment and payment of the moneys as aforesaid to the defendant and the commencement of proceedings in bankruptcy.

That the defendant, his agents and attorney, at and before the time of the entry of the aforesaid judgment and the collection of the said

moneys, were informed and knew and had reasonable cause to believe the said David B. Comstock and Van E. Young were insolvent, and that said judgment was obtained and preference given in fraud of the provisions of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and the amendments thereto.

That the defendant, his agents or attorneys, collected from the said Comstock & Young, prior to the commencement of proceedings in bankruptcy, the sum of nineteen hundred and thirty-five dollars and fifty-seven cents.

That this plaintiff, as such assignee, is entitled to recover of the defendant the whole amount received by him on account of the said claim and judgment, under the thirty-fifth section of the bankrupt act; that the plaintiff has demanded the same from the defendant, but said defendant has refused and still refuses to pay the same or any part thereof.

13 Wherefore the plaintiff demands judgment against the said defendant for the sum of nineteen hundred and thirty-five dollars and fifty-seven cents, with interest on four hundred dollars thereof from the thirty-first day of March, one thousand eight hundred and seventy, and with interest on fifteen hundred and thirty-five dollars and fifty-seven cents from the second day of June, one thousand eight hundred and seventy, besides the costs of this action.

WILLIAM RUSSELL,
Plaintiff's Attorney, 134 & 136 *Grand street, New York City.*

STATE OF NEW YORK,
City and County of New York, ss:

William Russell, being duly sworn, says that he is the attorney of the plaintiff in this action; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason the verification is not made by the plaintiff is that he is not within the county of Kings, which is the county where deponent resides, and this deponent's knowledge is derived from letters of the plaintiff and documentary evidence in the possession of deponent, relating to the facts set forth in the foregoing complaint, and from conversation with and information received from Don M. Dickinson, esquire, of Detroit, Michigan, the counsel for the plaintiff in said State of Michigan; that the grounds of his belief are infor-

14 mation received from the letters of the plaintiff, and from the documentary evidence aforesaid, and from the conversations with the said Dickinson in relation to the subject-matter of the action.

WILLIAM RUSSELL.

Sworn to before me this 21st day of June, 1872.

GEO. MARSHALL,
Notary Public, New York County.

Supreme court, county of Kings.

JULIUS HOUSEMAN, ASSIGNEE, &C., PLAINTIFF,
agst.
HORACE B. CLAFLIN, DEFENDANT.

The defendant, who appears herein by Arnoux, Ritch & Woodford, his attorneys, demurs to the complaint herein, because it appears on the face thereof—

That the court has no jurisdiction of the subject of the action;
That the complaint does not state facts sufficient to constitute a cause of action.

ARNOUX, RITCH & WOODFORD,
Attorneys for Defendant.

NEW YORK, *July 12th*, 1872.

15 At a special term of the supreme court held in and for the county of Kings, at the court-house in the city of Brooklyn, on the 13th day of January, 1873.

Present, Hon. Jasper W. Gilbert, justice.

JULIUS HOUSEMAN, ASSIGNEE, &C., PLAINTIFF,
agst.
HORACE B. CLAFLIN, DEFENDANT.

Upon the coming on to be tried of the issue of law raised by the demurrer to the complaint herein, and after hearing and considering the arguments of William H. Arnoux, esq., in support of said demurrer, and B. Doran Killian, esq., of counsel for plaintiff, in opposition thereto,

It is adjudged that plaintiff have judgment against defendant, as prayed for in the complaint; and

It is ordered that the defendant have leave to answer within twenty days, on payment of costs.

A copy. GEORGE G. HERMON, *Clerk.*

16 Supreme court, county of Kings.

JULIUS HOUSEMAN, ASSIGNEE, PLAINTIFF,
agst.
HORACE B. CLAFLIN, DEFENDANT.
Judgment, March 11, 1873.

The issue of law raised by the demurrer herein having been tried before the Hon. J. W. Gilbert at a special term of this court held in and for the county of Kings, in the court-house in the city of Brooklyn, on the 13th day of January, 1873, and it having then and there been determined and adjudged that plaintiff have judgment on said issue against the defendant, with costs:

Now, on motion of B. Doran Killian, esq., of counsel for said plaintiff, it is adjudged that plaintiff have judgment against the defendant on the merits, and that plaintiff recover of the defendant the sum of eighty-one dollars and eighty-one cents as costs, and the sum of twenty-three hundred and sixty-nine dollars and sixteen cents damages and interest, making in the aggregate the sum of twenty-four hundred and fifty dollars and ninety-six cents.

GEORGE G. HERMON, *Clerk.*

17 New York supreme court, county of Kings.

JULIUS HOUSEMAN, ASSIGNEE, ETC., PLAINTIFF,
agst.
HORACE B. CLAFLIN, DEFENDANT.

Take notice that the defendant appeals to the general term of this court from the judgment entered herein on the 11th day of

March, 1873, for $2,369.16 and $81.81 costs, and from every part of the same.

Dated New York, March 11, 1873.

ARNOUX, RITCH & WOODFORD,
Attorneys for Defendant.

To WILLIAM RUSSELL, Esq.,
Attorney for Plaintiff.
GEORGE G. HERMON,
County Clerk.

18 At a general term of the supreme court of the State of New York held in and for the second department thereof at the court-house in the city of Poughkeepsie, the county of Dutchess, on the day of May, 1873.

Present, Hon. Joseph F. Barnard, Hon. Calvin E. Pratt.

JULIUS HOUSEMAN, ASSIGNEE, RESPONDENT,
agst.
HORACE B. CLAFLIN, APPELLANT.

The appeal from the judgment entered in this action on the 11th day of March, 1873, for twenty-five hundred and fifty dollars and ninety-six cents, having been heard at the general term, it is now, on motion of B. Doran Killian, esq., for respondent, after hearing William Henry Arnoux, esq., for appellant, adjudged that the said judgment be affirmed with two hundred and thirteen dollars and fifty cents costs to the respondent.

C. E. PRATT,
Justice Supreme Court.

A copy. GEORGE G. HERMON, *Clerk.*

19 New York supreme court, County of Kings.

JULIUS HOUSEMAN, ASSIGNEE, ETC., RESPONDENT,
agst.
HORACE B. CLAFLIN APPELLANT.

Judgment, April 24, 1874.

The defendant in this action having appealed to the general term of this court from the judgment entered on the 11th day of March, 1873, for $2,450.96 in favor of the plaintiff, and the annexed decision having been made and filed, whereby said judgment is affirmed:

Now, on motion of William Russell, attorney for plaintiff, it is

Adjudged that the said judgment be affirmed with two hundred and thirteen dollars and fifty cents cost to the respondent.

GEORGE G. HERMAN, *Clerk.*

20 New York supreme court, county of Kings.

JULIUS HOUSEMAN, ASSIGNEE, ETC., RESPONDENT,
agst.
HORACE B. CLAFLIN, APPELLANT,

GENTLEMEN: Take notice that the defendant hereby appeals to the court of appeals from the judgment of the general term entered herein, dated day of May, 1873, affirming the judgment entered herein on

the 11th day of March, 1873, in favor of the plaintiff against the defendant, and from every part thereof.

ARNOUX, RITCH & WOODFORD,
Attorneys for Appellant.

To WM. RUSSELL, Esq.,
Attorney for Respondent.
GEORGE G. HERMON, *Clerk.*

STATE OF NEW YORK, *County of Kings, ss :*

I, George G. Herman, clerk of the county of Kings, and clerk of the supreme court of the State of New York in and for said county, (said court being a court of record,) do hereby certify that I have compared the foregoing with the original judgment-roll & notice of appeal on file in my office, and that the same are true transcripts thereof, and of the whole of such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 8th day of May, 1874.

[L. S.] GEORGE G. HERMAN, *Clerk.*

21 N. Y. supreme court.

JULIUS HOUSEMAN, ASSIGNEE, ETC., RESPONDENT.
agst.
HORACE B. CLAFLIN, APPELLANT.

CITY AND COUNTY OF NEW YORK, *ss :*

William Henry Arnoux, being duly sworn, says that he is one of the attorneys for the defendant and appellant herein; that he was the counsel who argued the appeal at the general term for the appellant, and that said general term affirmed the judgment of the special term herein, but that so far as deponent has been able to ascertain and as he believes, no opinion was delivered or written by the said general term or any of the judges thereof.

WM. HENRY ARNOUX.

Sworn before me this sixth day of May, 1874.

JOSHUA M. FIERO,
Notary Public, N. Y. C.

22 At a special term of the supreme court of the State of New York held in and for the county of Kings, at the county court-house in the city of Brooklyn, on the 21st day of July, 1874 :

Present, Hon. C. E. Pratt, J.

JULIUS B. HOUSEMAN, ASSIGNEE, &C.,
vs.
HORACE B. CLAFLIN.

Horace B. Claflin, the defendant, having appealed to the court of appeals from the judgment of the general term of this court, bearing date the day of May, 1873, affirming the judgment of the special term of this court, which said judgment of the general term was signed by the clerk of this court and duly entered in his office on the 24th day of April, 1874, and said court of appeals having affirmed said judgment of this court: Now, on motion of William Russell, of counsel for
23 respondent, the remittitur from the said court of appeals having been heretofore filed with the clerk of this court, it is ordered

that the judgment of the court of appeals be, and the same is hereby, made the judgment of this court, and that the respondent, Julius Houseman, have execution thereon, together with his costs on appeal, as per said remittitur ordered, to be hereafter taxed.

C. E. PRATT, *J. S. C.*

We consent to the entry of the above order.

ARNOUX, RITCH & WOODFORD,
Attys. for Deft.

JULY 21, '74.

G. G. H., *Clk.*

24 N. Y. supreme court, Kings County.

JULIUS HOUSEMAN, ASSIGNEE, &C., RESPT.,
vs.
HORACE B. CLAFLIN, APPLT.

GENTS.: Please take notice that the remittitur in the above-entitled action has this day been filed in the office of the clerk of this court in the county of Kings, and that on the 15 day of July, 1874, I shall move this court, at a special term thereof to be held at chambers, in the county court-house in the city of Brooklyn, county of Kings, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order that judgment be entered thereon.

Dated N. Y., July 11, 1874.

Yours, &c.,

WM. RUSSELL, *Pltff.'s Atty.*

To ARNOUX, RITCH & WOODFORD, Esqrs.,
Deft.'s Attys.

Due service of a copy of the within notice is hereby admitted. N. Y., July 11, 1874.

ARNOUX, RITCH & WOODFORD.

25 At a special term of the supreme court of the State of New York held in and for the county of Kings, at the county court-house in the city of Brooklyn, county of Kings, on the 24 day of July, 1874:

Present, Hon. C. E. Pratt, justice.

JULIUS HOUSEMAN, ASSIGNEE, &C.,
vs.
HORACE B. CLAFLIN.

An appeal from the judgment entered in this action on the 24 day of April, 1874, having been taken to the court of appeals, whereupon said judgment was affirmed with costs to the plaintiff, and the record remitted from said court of appeals having been filed with the clerk of this court, and judgment upon the remittitur having been made the judgment of this court by an order duly entered on the 21 day of July, 1874, and the costs and disbursements of the plaintiff & respondent in pursuance with said remittitur having been taxed by the clerk of this court (upon due notice to the appellant) at one hundred and
26 twenty-seven dollars and eighty-nine cents: Now, on motion of Wm. Russell, of counsel for plaintiff, it is ordered and adjudged

that plaintiff have judgment against the defendant for the sum of one hundred and twenty-seven dollars and eighty-nine cents, his costs and disbursements aforesaid.

C. E. PRATT, *J. S. C.*

GEORGE G. HERMAN, *Clerk.*

(Endorsed:) Filed Sept. 5, 1874, at 12.30 p. m.

27 Supreme Court of the United States.

HORACE B. CLAFLIN, PLAINTIFF IN ERROR,
agt.
JULIUS HOUSEMAN, ASSIGNEE IN BANKRUPTCY,
defendant in error.

I hereby waive the making and filing of the usual bond for costs and damages herein, hereby consenting and stipulating that the writ of error herein be prosecuted and determined in all respects in the same manner and to the like effect as if the said bond had been given.

Dated New York, 21 August, 1874.

WILLIAM RUSSELL,
Atty. for Deft. in Error, 167 *Broadway, N. Y.*

The above waiver of bond by the defendant in error is hereby approved.

Dated Aug. 31, 1874.

J. F. BARNARD,
Presiding Justice of the Supreme Court New York, Second Department.

(Indorsed:) Supreme Court. Horace B. Claflin, plff. in error, agt. Julius Houseman, assignee in bankruptcy, deft. in error. Xd. Copy. Waiver of bond, and approval. Arnoux, Ritch & Woodford, attys. for plff.

(Indorsement on cover:) No. 243. Horace B. Claflin, plaintiff in error, vs. Julius Houseman, assignee in bankruptcy of D. B. Comstock and Van E. Young. New York supreme court. Remittitur. Filed 11th September,

In the Supreme Court

OF THE UNITED STATES.

HORACE B. CLAFLIN,

Plaintiff in Error.

against

JULIUS HOUSEMAN,

Defendant in Error.

Points for Plaintiff in Error,

UPON THE EXCLUSIVE JURISDICTION OF THE NATIONAL COURTS UNDER THE BANKRUPT LAW.

ARNOUX, RITCH & WOODFORD,

Attorneys for Plaintiff in Error.

WM. HENRY ARNOUX,

Of Counsel.

NEW YORK:
LANGE, LITTLE & CO., PRINTERS,
10 TO 20 ASTOR PLACE.
1876.

Supreme Court of the United States.

HORACE B. CLAFLIN,
Plaintiff in Error,
agst.
JULIUS HOUSEMAN, Assignee in Bankruptcy,
Defendant in Error.

Points for Plaintiff in Error.

STATEMENT OF FACTS.

THIS is a writ of error duly allowed, by which a judgment of the Supreme Court of the State of New York, entered on a remittitur from the Court of Appeals, involving the construction of a statute of the United States, is brought before this Court for review. The case arises out of the following circumstances:

On the 18th day of August, 1870, under proceedings in involuntary bankruptcy, Comstock & Young were declared bankrupts by the District Court of the United States for the Western District of Michigan, and the plaintiff below, the defendant in error herein, is as he alleges a resident of Grand Rapids in the State of Michigan, and is the assignee in bankruptcy of said Comstock & Young, without alleging how, when, or under what power or authority, he was so appointed.

On or about the 21st day of June, 1872, the said Houseman commenced an action in the Supreme Court

of the State of New York against Horace B. Claflin, by the service of summons and complaint, in which complaint it was alleged that on the 2d day of March, 1870, the said Claflin commenced an action against Comstock & Young (who were then insolvent or in contemplation of insolvency), to recover one thousand eight hundred and sixty-two dollars and ninety-two cents, the amount of three promissory notes held by him, and for which they were indebted to him: that on the 31st day of March, 1870, said Comstock & Young paid said Claflin four hundred dollars on said claim, "with intent to give defendant a preference over other of their creditors." That on the 19th day of May, 1870, said Comstock & Young, being insolvent, or in contemplation of insolvency as aforesaid, and with intent to give the defendant (said Claflin) a preference over others of their creditors, *suffered* the said defendant to obtain judgment by default, for the sum of one thousand five hundred and thirty-five dollars and fifty-seven cents, damages and costs, which on the 2d day of June, 1870, was collected by the Marshal and paid to defendant, without alleging how, where, out of what property, who the Marshal was, or by what process the money was so paid, unless the said allegation is aided by a separate and independent allegation, that said Claflin collected from said Comstock & Young, prior to the commencement of proceedings in bankruptcy, the sum of one thousand nine hundred and thirty-five dollars and fifty-seven cents.

The complaint further alleged that the said Claflin, at the time of the entry of said judgment, knew and had reasonable cause to believe that the said Comstock & Young were insolvent, and that said judgment was obtained and preference given in fraud of the provisions of the Bankrupt Act: that plaintiff is entitled to recover of the defendant the whole amount received under the 35th Section of the Bankrupt Act, and has demand-

ed said sum of said Claflin, which he has refused to pay; and the plaintiff below demands judgment therefor.

The said Claflin being unwilling to submit to the State Courts the adjudication of this question, demurred to the complaint on the ground,

First: That the Court has no jurisdiction of the subject of the action. And if the State Court did have jurisdiction, on the further ground,

Second: That the complaint does not state facts sufficient to constitute a cause of action.

This practice is in accordance with the provisions of the Code of Procedure of the State of New York.

On the 27th day of December, 1872, the demurrer was argued at the Special Term of the New York Supreme Court, before the Hon. J. W. Gilbert, J., when the same was overruled with leave to said Claflin to answer, which was declined, and judgment absolute was rendered against him, from which an appeal was taken to the General Term of the Supreme Court, where the judgment was affirmed, and from that judgment an appeal was taken to the Court of Appeals with a similar result. The remittitur of the Court of Appeals was duly filed, and its judgment made a final judgment in the New York Supreme Court, according to law, and from thence this case was removed to this Court by writ of error by the defendant in the original judgment.

ASSIGNMENT OF ERRORS.

First: The State Courts erred in holding that the State Courts have jurisdiction to administer the National Bankrupt Act, in respect to those causes of action that spring out of the Bankrupt Act itself.

Second: The State Courts erred in holding that the complaint stated facts sufficient to show that the defendant in error in this action, was duly appointed an assignee in bankruptcy.

Third: The State Courts erred in holding that the complaint stated facts sufficient to show that Comstock & Young, the alleged bankrupts, *procured* the recovery of the judgment against them as required by the provisions of the 35th Section of the Bankrupt Act.

Fourth: The State Courts erred in holding that the complaint stated facts sufficient to show that the said Claflin had committed any act in fraud of said Bankrupt Act.

Fifth: The State Courts erred in holding that the complaint stated facts sufficient to show that the defendant in error in this action, had a legal capacity to sue in the State Court.

Sixth: The State Courts erred in holding that the complaint stated facts sufficient to give jurisdiction or to constitute a cause of action.

POINTS.

I.

In the United States the people of the several States are the source of power. The National Government possesses only delegated powers, and such implied and resulting powers as are necessary to preserve its existence and discharge its functions. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." (Tenth Amendment.)

First: A brief review of our political history, and the opinion of the great constitutional expounders, will corroborate this statement, and will remind this Court how sedulously and jealously the fathers of the Republic guarded the rights of the people and of the State from national encroachments.

The original "Plan of Union" proposed at the Convention that met at Albany, June 19th, 1754, was rejected by every one of the Colonies, because it required the surrender of too much of their powers.

1 Hough, Am. Const., 2.

Subsequently, and on the 9th day of July, 1788, Articles of Confederation were adopted at Philadelphia; but in these articles the States Rights men (so called) had so far succeeded in upholding the rights of the State, that they had left Congress powerless to enforce its own ordinances. In view of this deficiency an effort was early made to obtain a concession of power sufficient to meet the necessities of the Government,

and urgent appeals were made to the patriotism of the States, but without satisfactory result.

Ib., 20.

These efforts, however, led to the assembling of the Convention that framed the present Constitution, in respect to which a high authority remarks: "We are now carefully to observe the position of the States when thus assembled in Convention. Their meeting was purely voluntary; they met as equals; they were sovereign political communities, whom no power could rightfully coerce into a change of their condition, and with whom such a change must be the result of their own free and intelligent choice, governed by no other than the force of circumstances. That they were independent of foreign control was ascertained by the Declaration of Independence, by the war, and by the Treaty of Peace. That they were independent of each other, except so far as they had made certain mutual stipulations in the Articles of Confederation, was the necessary result of the events which had made the people of each State its rightful and exclusive sovereign."

2 Curtis, On the Constitution, p. 27.

When that Convention had completed its labors the present Federal Constitution was transmitted to the several States for ratification, with an official letter from George Washington, dated September 17, 1787, containing the following statement: "Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the subject to be obtained. It is at all times diffi-

cult to draw with precision the line between those rights which must be surrendered, and those which must be preserved; and on the present occasion this difficulty is increased by a difference among the several States as to their situation, extent, habits, and particular interests. In all our deliberations on this subject we kept steadily in view that which appeared to us the greatest interest of every true American: the consolidation of our Union; in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of inferior magnitude than might have been otherwise expected. And thus the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable."

1 Hough, Am. Const., 22.
1 Story, On Const., § 276.

Notwithstanding this earnest appeal, "each State was naturally tenacious of its own sovereignty and independence, which had been expressly reserved in their antecedent association, and of which it was still meant to retain all that it did not become unavoidably necessary to surrender" (Rawle on Const., 18), and it was with great difficulty that the necessary ratification was obtained.

In contemplation of this jealous tenacity of the States of their own rights, and which were so reluctantly yielded, Judge Cooley says:

"The American system is one of complete decentralization, the primary and vital idea of which is that local affairs shall be managed by

local authorities, and only general affairs by the central authority. It was under the control of this idea that a national Constitution was formed, under which the States, while yielding to the national Government complete and exclusive jurisdiction over external affairs, conferred upon it such powers only, in regard to matters of internal regulation, as seemed to be essential to national union, strength, and harmony, and without which the purpose in organizing the national authority might have been defeated."

Cooley, Const. Lim., 189.
1 Story on Const., 4th ed., § 280, note 1

Judge Story thus states the effect of the Constitution framed by that Convention:

"The Federal Government is one of enumerated powers, the Constitution being the measure thereof, and the powers not delegated thereby being reserved to the individual States or to the people.

"The powers of sovereignty not thus delegated, vest in the people of the individual States, who confer the same for ordinary exercise, with such exceptions and limitations and under such regulations as they see fit to establish upon the departments and offices of government, which by their constitutions they create for the States respectively."

1 Story, On Const., 4th ed., 196.

"When the Revolution took place the people of each State became themselves sovereign * * subject only to the rights since surrendered by the Constitution to the General Government."

Martin *v.* Waddell, 16 Pet., 410.

Thus Attorney-General William Wirt said:

"The United States have no existence as a political ideal being, except under the organization of the Constitution and laws of the United States."

1 Opinions of the Attorneys General, 457.
See 1 Kent, 297, note.

And very recently the New York Court of Appeals has expressed the same sentiment.

"State Courts have jurisdiction of all legal questions not forbidden by the Constitution and by the laws of the United States passed in pursuance of its authority. But the Courts of the United States have cognizance of such matters only as are given by the Constitution and by the acts of Congress passed under its authority."

Having shown by the foregoing that by the adoption of the Constitution the people of the States surrendered to the nation the powers embraced in the Constitution, we next proceed to examine what those powers were, and to what extent they were thus surrendered. The reserved rights of the States incidentally herein discussed are not directly involved in the case before the court, but in presenting the question of the powers delegated by the national Constitution, we desire to be distinctly understood as repelling the possible imputation of ignoring the reserved rights of the State, or their just relations to the subject matter presented.

II.

The national Government has not only a *supreme* but an *exclusive* right to exercise the powers that have been delegated to the United States by the Constitution.

First: That this right is *supreme* is expressly declared.

The language of the Constitution is this:

"This Constitution, *and the laws of the United States*, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the *supreme law* of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

U. S. Const., Art. 6, Sec. 2.

The great expounder of the Constitution thus comments upon this provision:

"It is the people's Constitution, the people's Government, made for the people, made by the people, and answerable to the people. *The people of the United States have declared that this Constitution shall be the supreme law.* The States are unquestionably sovereign so far as their sovereignty is not affected by this supreme law. The national Government possesses those powers which it can be shown the people have conferred upon it, and no more."

Webster on States Rights, 4 Elliot's Debates, 498.

Second: It logically follows that when the laws of the United States are *supreme*, they must be *exclusive* in their supremacy.

The powers conferred upon Congress by the Constitution of the United States are either in their nature, or when exercised, exclusive, and inhibit all State legislation upon the matters embraced within such power.

The second article of the Constitution of the United States provides as follows:

The Congress shall have power,

1. To lay and collect taxes, imposts, and excises; to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

This is exclusive.

Gibbons *v.* Ogden, 9 Wheat., 199.
Jackson's Proclamation, 10th Dec., 1832.

2. To borrow money on the credit of the United States.

This is necessarily exclusive.

3. To regulate commerce with foreign nations and among the several States, and with the Indian tribes.

This is exclusive when Congress legislates.

Gibbons *v.* Ogden, 9 Wheat., 1.
Brown *v.* Maryland, 12 Wheat., 436.
Wilson *v.* Blackbird Creek Co., 2 Peters, 245.
Henderson *v.* Wickham, 13 Albany L. J., 248, and cases cited.

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies through the United States.

This is exclusive as to naturalization.

Chirac *v.* Lessee of Chirac, 2 Wheat., 259.
Houston *v.* Moore, 5 Wheat., 48.

We reserve for the present a consideration of the rest of this section, and will present a fuller discussion as to bankruptcy later.

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

This is exclusive by the Constitution, Art. 1, Sec. 10.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States.

This is exclusive.

Fox *v.* Ohio, 5 Howard, 433.
U. S. *v.* Marigold, 9 Howard, 560.

7. To establish post offices and post roads.

This is exclusive.

Rawle on Const., 103 Ch. 9.

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

This is exclusive.

Dudley *v.* Mayhew, 3 N. Y., 1.
Livingston *v.* Van Ingen, 9 Johns., 582.
Parsons *v.* Barnard, 7 Johns., 144.

9. To constitute tribunals inferior to the Supreme Court; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

This is necessarily exclusive as to the tribunals inferior to Supreme Court and in respect to piracies and offences against the law of nations.

10. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

This is exclusive.

2 Story on Const., § 1, 177.
Rawle on Const., 109.

11. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

This is exclusive.

2 Story on Const., § 118, 3.

12. To provide and maintain a navy.

This is so clearly exclusive, that it has never been made the subject of adjudication.

13–15. Regulating the army and militia.

These are exclusive, except as modified by the subsequent amendments.

Rawle on Const., 111.

16. Respecting District of Columbia.

This is in terms exclusive.

17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any departments or offices thereof.

From this review it will be seen that, leaving out of view the one under consideration, every provision of this article with the exception of part of the ninth subdivision, is exclusive. The exception there is of a common-law right, and is expressly reserved to the States under the Judiciary Act.

Act September 24, 1789.
Rawle on Const., 108.

So in regard to the maritime and admiralty jurisdiction.

U. S. Const., Art. 3, Sec. 2, Sub. 1.

It is concurrent where the States exercise a common-law right.

Act 1789, 1 Stat. at Large, 76, § 9.
Home Ins. Co. *v.* N. W. Ins. Co., 32 Iowa, 223; 7 Am., 183.
Brookman *v.* Hamill, 43 N. Y., 554.

It is exclusively within the national control where there is no common-law right, and State laws on the subject are unconstitutional.

In re Steamboat Josephine, 39 N. Y., 19.

The State Courts have exclusive jurisdiction over all contracts relating to vessels which are not of maritime jurisdiction.

The Jefferson, 20 Howard, 393.
Edwards *v.* Elliott, 21 Wall, 532, 555.
Brookman *v.* Hammill, 43 N. Y., 554.

In the last cited case Rapallo, J., says of this class of cases: "The exercise by the States, therefore, of jurisdiction in that class of cases, under any form of proceedings whatever, could not come in conflict with the powers of the Federal judiciary, *for it had none.*"

This idea of the exclusive jurisdiction granted by the Constitution finds support in the opinion of Grover, J., in Daryan *v.* Champlain Transportation Co., 56 N. Y., 1, 4, where in a case arising under the maritime jurisdiction provision, he cites the Act of 1789, and Act of Congress, 1845, ch. 29, § 1

(saving concurrent remedies at common law), and he admits that the intention of the statute was to confer *exclusive* jurisdiction upon the District Courts, at the same time leaving to the suitor his option of seeking redress at common law when it could be so obtained.

We now enter upon the consideration of the fourth section so far as it relates to bankruptcy.

The *exercise* by Congress of the power to establish uniform laws upon the subject of bankruptcies throughout the United States is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the State.

Sturgis *v.* Crowninshield, 4 Wheat., 122.

Mr. Webster afterward contended that under this decision the prohibition of the Constitution was leveled only against *interference* in individual cases, and did not apply to general laws.

This Court rejected that conclusion, and held that no State had authority to pass a bankrupt law conflicting with any Act of Congress establishing an uniform system of bankruptcy.

Ogden *v.* Saunders, 12 Wheat., 213.

This Court afterward declared "these decisions are final and conclusive."

Hayle *v.* Zacharie, 6 Pet., 638.

The extent of the power thus conferred by Congress is considered in Klein's case, 1 How., 250, and see

Sackett *v.* Andross, 2 Hill, 327.
Kunzler *v.* Kohaus, 5 Hill, 317.

If the foregoing propositions are sound, they establish with precision and distinctness the boundary between State rights and National authority—between that centralization that would destroy the State, and that decentralization that would destroy the Union. They prove that the people made the States and the Union distinct, yet inseparable, and gave to them their respective powers—to the Union, supreme, but conferred power; to the States, supreme, but contracted power. Each, therefore, being supreme in its own sphere, accountable only to the people, and wholly independent of the other, discharges its separate and appropriate functions without collision or conflict of authority. This is the grandest discovery in the science of government that the world has ever known since the foundation of civil liberty—that two governments could co-exist and intermingle without being effaced or impaired; and it should always be the endeavor of courts to observe and preserve this complete partition of power between the Union and the State.

The necessity for this independence has been generally recognized. "The durability of the existing *national* organization," says Rapallo, J., in First National Bank *v.* Lamb, 50 N. Y., 107, "must depend upon

the good faith with which control is accorded to each department within its own sphere, and encroachments by either upon the other are avoided."

III.

The judicial powers of the States of the Union respectively are precisely as extensive, exclusive, and potential as are their respective legislative powers, and can neither be enlarged nor abridged, except by their respective legislatures. Hence it follows where or whenever the power of legislation on any particular subject-matter is taken from the State by the national Constitution itself acting *proprio vigore*, or by the authorized action of Congress under the Constitution, the courts of the State have not, and cannot exercise, any jurisdiction over such subject-matter.

This question presents itself in the light of general principle and of precedent. The general principle is stated in the opinion of Marshall, Chief Justice, in the leading case of

Osborn *v.* U. S. Bank, 9 Wheat., 818.

"The legislative, executive, and judicial powers of every well-constructed government are potentially co-extensive with each other."

To the judicial mind the surrender of the *political* power by the people to the National Government was always considered to be absolute and irrevocable. Recent events, when an appeal was taken to the power of the sword, have established this view in the popular mind throughout the length and breadth of the land.

But the *judicial* power is more complex, and has admitted of a wider divergence of thought, requiring the patient and profound consideration

of the judiciary to establish it on a sound and stable foundation. Shortly after the adoption of the Constitution, Virginia asserted her sovereign right to give construction to the Constitution, which this Court, with great wisdom and equal firmness, denied. This action of this Court, under a kind Providence, made the nation a possibility.

It is the same spirit we now invoke in this appeal, by which we demand that the national law shall be enforced through its own tribunals. To deny this right is to deprive the nation of the means of enforcing its laws through the instrumentality of its own tribunals. "So fatal a result," says Marshall, Chief Justice, "must be deprecated by all."

U. S. *v.* Peters, 5 Cranch, 115.

To arrive at a clearer understanding of the necessity for this conclusion let us observe, by way of broad generalization, the quadruple character of the judicial functions in this country.

First: The State Courts have exclusive jurisdiction in certain cases.

Second: The State Courts have incidental cognizance of national law.

Third: The National and State Courts have concurrent jurisdiction, by reason of the status of parties, and in such cases the National Court administers State law.

Fourth: The National Courts have exclusive jurisdiction over certain subject-matters.

Simple though they seem in statement, a cen-

tury has not sufficed to enable the courts to fully comprehend them.

1. In certain cases, where the State Courts have jurisdiction, such jurisdiction is exclusive.

> This Court, in Martin *v.* Hunter, 1 Wheat., 334, 7, held, "The State Courts are independent tribunals; not deriving their authority from the same sovereign, and, as regards the Federal Courts, a foreign power in every way its equal."
>
> The State sovereign has the exclusive right to pass laws where not restricted by the National Constitution, to adjudicate upon such laws where its own citizens are concerned, and to enforce such laws. Its courts are no more within the control of Congress, than is its legislature. The District Courts of the United States have no direct supervisory control over any State Court.

Congress has not the power, if it had the will, to *confer* jurisdiction on any State Court.

> Dudley *v.* Mayhew, 3 N. Y., 9.
> Valarino *v.* Thompson, 7 N. Y., 576.
> U. S. *v.* Lathrop, 17 Johns., 4.
> Parsons *v.* Barnard, 7 Johns., 144.
> Manhardt *v.* Soderstrom, 1 Binney, 138.
> Peck *v.* Jenness, 7 How. U. S., 612, 624.
> Martin *v.* Hunter, 1 Wheat., 334, 5, 7.

> The last above cited case holds that jurisdiction over cases arising under the laws of the United States cannot be conferred on the State Court by Congress, for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. And so the converse of

this proposition has been determined, that the jurisdiction of the Federal Courts cannot be enlarged or restricted by State legislation.

The St. Lawrence, 1 Black, 522.
Rhode Island *v.* Mass., 12 Pet., 657.

The judicial functions have the exact limitation that the legislative functions have. No more and no less. It is usurpation for courts to legislate or for the legislature to adjudicate.

The question as to the true limits of the national jurisdiction is exclusively a judicial question, and no State law or Act of Congress can make it broader or narrower than the judicial power may determine those limits to be.

The St. Lawrence, 1 Black, 526.
The Lottawanna, 21 Wall, 558, 577.

It is an equally flagrant act of usurpation for National Courts to adjudicate on State matters that are beyond their jurisdiction, because it is an interference in matters belonging to another sovereign.

2. There is a right in the State Courts incidentally to take cognizance of Federal laws.

"State Courts may, in the exercise of their ordinary, original, and rightful jurisdiction, incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States."

1 Kent's Com., 3d ed., 397.

"Congress may, indeed, permit the State Courts to exercise a concurrent jurisdiction in many cases, but these courts then derive no authority from Congress over the subject

matter, but are simply left to the exercise of such jurisdiction as is conferred upon them by the State Constitution and laws."

3 Story on Const., § 1749.

This incidental cognizance refers to that cognizance that all courts necessarily have of the laws, manners, and customs of other countries, and to which one of the distinguished authors of the Federalist alludes in saying: "The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of the dispute are relative to the laws of the most distant part of the globe. Those of Japan not less than of New York may furnish the objects of equal discussion to our courts."

Federalist, No. 82.

A fair illustration of this is furnished in the case of Kelly *v.* Crapo, 45 N. Y., 86; 16 Wall, 610; where the sheriff under a common-law writ seized a vessel, and the defendant pleaded title under the laws of a sister State.

Also in the case of Rose *v.* Himely, 4 Cranch, 241, where the defendant claimed title based upon proceedings in a foreign tribunal.

But with wise prevision the Constitution compels the submission of such incidental question to the Supreme Court of the United States for ultimate decision.

3. The concurrent jurisdiction of the State and Na-

tional Judiciary gives a right to the Federal Courts to adjudicate upon State questions as administering State law.

In the minds of judges in the State Courts there exists great confusion in respect to this matter of concurrent jurisdiction. From their decisions it appears that they suppose that State Courts have a joint right to pass upon certain national questions with the Federal Courts, but this is erroneous. The Constitution gives the National Courts, over every subject matter wherein the State Courts can entertain jurisdiction, power as executors of State judicial functions to adjudicate where the *status* of the parties makes it expedient.

Where the United States Courts adjudicate on questions that come before them, under their concurrent powers, they administer State laws, and are bound to decide in accordance with the adjudications of the ultimate appellate State tribunal.

Carroll *v.* Carroll, 16 How. U. S., 275.
Massey *v.* Allen, 7 N. B. R., 401.

The State tribunal has no jurisdiction of the subject matter where jurisdiction is confided to Congress by the Constitution, and consent cannot give jurisdiction, while concurrent jurisdiction depends upon the personal privileges of the party, and the election of forum may be made by plaintiff or may be waived by defendant by a general appearance in the action

Dudley *v.* Mayhew, 3 N. Y., 9.
Coffin *v.* Tracy, 3 Caine's R., 129.
McMahon *v.* Rauhr, 47 N. Y., 67.
Landers *v.* Staten I. R. R., 53 N. Y., 450.
Buckle *v.* Eckhart, 3 N. Y., 137.

Wheeler *v.* Lampmarsh, 14 J. R., 481.
Davis *v.* Packard, 6 Peters, 47.
Overstreet *v.* Brown, 4 McCord, 79.
Lindsley *v.* McClelland, 1 Bibb, 262.

Besides this concurrent jurisdiction that the Federal Courts have with the State Courts by reason of the *status* of parties, it has been intimated that there may be certain cases wherein, by reason of a common-law jurisdiction over the subject matter in the State Courts prior to the adoption of the Constitution, and the grant of such jurisdiction to the national authority by the Constitution, there exists concurrent jurisdiction.

"It *only* can be in those cases where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction."

Martin *v.* Hunter, 1 Wheat., 304.

"This doctrine of concurrent jurisdiction is *only* clearly applicable to those descriptions of causes of which the State Courts had previous cognizance."

Federalist, No. 82.

The Constitution has not, by its own force, divested the State Courts of any of their *former* jurisdiction; and a mere grant of jurisdiction to a particular court, without word of exclusion as to other courts *previously* possessing the like powers, will only have the effect of constituting the former a court of concurrent jurisdiction with the latter.

Delafield *v.* State of Illinois, 2 Hill, 159.
Teall *v.* Hudson, 1 N. Y., 537, 545.

Church, Ch. J., says, "To confer jurisdiction upon one court does not operate to oust other courts *before possessing* it, for the reason that concurrent jurisdiction is not inconsistent."

Cooke *v.* State Bk., 52 N. Y., 96, 106.

It may be well to observe here, as Marshall, Chief Justice, has lucidly pointed out in Martin *v.* Hunter, 1 Wheat., 333, that there was no attempt or intent in the provision granting to the Federal Courts concurrent jurisdiction above referred to, to make it exclusive, but on the contrary, it was the express object to preserve to the State, in these cases, their original jurisdiction, as we shall more fully demonstrate hereafter.

This provision, therefore, does not aid a construction in favor of any right in the State Court to adjudicate on national matters, but militates against it.

At common law, independent of the Act of Congress, there existed no such right of action as is here claimed, consequently the act is not cumulative, as there was no pre-existing right to resort to our State Courts for redress in such cases. The offence is created by a law of the United States, and is solely against their authority, and made punishable in a specific manner.

Houston *v.* Moore, 5 Wheat., 71, Story, J.
See Cook *v.* Whipple, 55 N. Y., 150, cited on the fifth point.

Fourth: Where Congress has an exclusive right to legislate, the National Courts have an exclusive power to adjudicate.

The general doctrine is, that "exclusive jurisdiction necessarily attends exclusive legislation."

U. S. *v.* Ames, 1 Woodbury & Minot, 76.
U. S. *v.* Bailey, 9 Peters, 261.

Or, as expressed in United States *v.* Cornell, 2 Mason's C. C. Rep., 91: "The right of exclusive legislation carries with it the right of exclusive jurisdiction."

"All governments which are not extremely defective in their organization, must possess within themselves the means of expounding, as well as enforcing, their own laws."

Osborn *v.* U. S. Bank, 9 Wheat., 818.

In this case of Osborn, it was held that a corporation created by Congress had no authority to sue in a State Court, even in a common-law action.

In Cooke *v.* State Bank, 52 N. Y., 108, Church, Ch. J., criticises this decision with manifest concern for the stability and perpetuity of republican institutions, but without appreciating the distinction between an action *by* or an action *against* such corporations (as to which see Eyster *v.* Gaff, 1 Otto, 525). Personally, we are most profoundly convinced that this decision in the case of Osborn is most philosophical, wise, and just, and that this court will adhere to it in the cases that may hereafter arise, although it is not necessary that that case should be upheld to establish the case at bar. This case was examined by Davies, Ch. J., in City of Utica v. Churchill, 33 N. Y., 235, and, deeply impressed with it, he remarked, "The powers of the national

and of the State governments were examined and investigated to their very foundations, with a thoroughness which few other questions have ever undergone."

Where the State cannot legislate, its courts cannot adjudicate.

To hold otherwise would make the creature greater than its creator.

U. S. *v.* Lathrop, 17 Johns., 4.
Martin *v.* Hunter, 1 Wheat., 330.
Rose *v.* Himely, 4 Cranch, 241, 276.
McLean *v.* Lafayette Bk., 3 McLean, 191.
Stearns *v.* U. S., 2 Paine, 311.
Shearman *v.* Bingham, 7 N. B. R., 490.

"States, in providing their own judicial tribunals, have a right to limit, control, and restrict their judicial functions and jurisdiction, according to their mere pleasure."

Per Clifford, J., Sherman *v.* Bingham, 7 N. B. R., 500.

But as in this matter the States cannot legislate at all, as has already been shown, how can they pass any law that shall limit, control, and restrict the judicial functions, if the courts have any jurisdiction over this subject?

Such legislation, if possible, would interfere with the uniformity of the system, for it would only be applicable to the courts of that particular State.

No court can exercise a jurisdiction which its sovereign cannot confer.

Deritiva potestas non potest esse major primativa.

Bouvier's Law Dict., Maxims.

On the other hand, jurisdiction of a cause of action

cannot belong to a court which cannot be controlled by the authority creating such cause of acton.

This cause of action was created by Congress. Congress cannot control the State courts; therefore State courts have no jurisdiction.

In Stearns *v.* The United States, 2 Paine's R., 311, the Court said: "Congress cannot compel a State Court to entertain jurisdiction in any case; they are not inferior courts in the sense of the Constitution; they are not ordained by Congress."

Congress cannot prescribe rules of evidence for the State Courts.

People *v.* Gates, 43 N. Y., 40.
Caldwell *v.* N. J. Steamboat Co., 47 N. Y., 282.
Moore *v.* Moore, 47 N. Y., 467.
Quinn *v.* Lloyd, 1 Sweeney, 253, 257.
Carpenter *v.* Snelling, 97 Mass., 452.

That "law" cannot be called "uniform" within the meaning of the Constitution that is administered under diverse rules of evidence.

The forcible argument of Story, J., on court-martials, is applicable to the civil court: "When a court-martial is spoken of in general terms in the Act of 1795," he says in Houston *v.* Moore, 5 Wheat., 66, the reasonable interpretation is that it is a court-martial to be organized under the authority of the United States—a court-martial whom Congress may *convene* and *regulate*. There is no pretence to say that Congress can compel a State court-martial to convene and sit in judgment on such offence. Such an authority is nowhere confided to it by the Constitution."

> But in addition to the general principle that every government must possess the exclusive right to adjudicate upon and enforce its own laws, we have the express words of the Constitution, which has not left this question to the risk of construction.

By the express terms of the Constitution, State Courts are prohibited from taking jurisdiction in cases arising out of the National Bankruptcy Act.

> It provides that Congress shall ordain and establish inferior courts in which the judicial power of the United States shall vest.
>
> U. S. Const., Art. 3, Sec. 1.

> It further provides that the *judicial power shall extend to all cases* in law and equity *arising under* this Constitution, *the laws of the United States,* and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls, etc.
>
> Const., Art. 3, Sec. 2, Sub. 1.

> Ch. J. Marshall says "the language of this clause is imperative. * * The judicial power *shall* extend to all cases enumerated in the Constitution. * * It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers, and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is that the judicial power shall extend to all

cases; but in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies, not to *all* controversies. * * It is hardly to be presumed that the variation in language was accidental. * * In the first place, as to cases arising under the Constitution, laws, and treaties of the United States. Here the State Courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the State Courts previous to the adoption of the Constitution, and it could not afterward be directly conferred on them, for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States."

Martin *v.* Hunter, 1 Wheaton, 304, 333.
Ex parte Cabrera, 1 Wash. C. C., 232.

The jurisdiction of the courts of the United States is *exclusive* in all cases arising under the Contitution, laws, or treaties of the United States.

2 Story on Const., § 1754.

Although at the common law consuls are not privileged as public ministers.

Vivian *v.* Becker, 3 Maul. & Sel., 284.

Under this provision it has been held that no action, civil or criminal, in a State Court, will lie against a consul.

Valermo *v.* Thompson, N. Y., 576.
Griffin *v.* Domingues, 2 Duer, 576.
Mannhardt *v.* Joderstron, 1 Binn., 138.

Commonwealth *v.* Kostaff, 5 Serg. & R., 545.
Davis *v.* Packard, 7 Peters, 276.

We have thus shown that every part of this subdivision of the second section of the third article of the Constitution confers exclusive judicial power upon the Courts of the United States.

Mr. Justice Story thus divides the exclusive jurisdiction of the nation :

1. Where the Constitution has expressly, in terms, given an exclusive power to Congress ; or,

2. The exercise of a like power is prohibited to the States ; or,

3. There is a direct repugnancy and incompatibility in the exercise of it by the States.

An example of the third class, as this court have already held, in Martin *v.* Hunter, 1 Wheat., 304, 337, is to be found in the power to establish a uniform rule of naturalization.

Houston *v.* Moore, 5 Wheat., 1, 49.

Mr. Justice Swayne says: The States exercise concurrent or independent power in all cases but three :

1. Where the power is lodged exclusively in the Federal Constitution.

2. Where it is given to the United States and prohibited to the States.

3. Where, from the nature and subjects of the power, it must necessarily be exer-

cised by the National Government exclusively.

Gilman *v.* Philadelphia, 3 Wall., 713, 732.

In the Home Ins. Co. *v.* Northwestern Ins. Co., 32 Iowa, 223; 7 Am., 183, Beck, J., says: "It will be observed that the judicial power of the United States under this provision of the Constitution extends to three classes of cases, determined respectively:

1. By the subject matter of the action wherein the power is exercised.
2. By the parties thereto; and
3. By the remedy to be enforced or course of proceedings therein; the last referring to cases of admiralty and maritime jurisdiction.

"The first clause of the section confers judicial power in actions arising under the Constitution, laws, and treaties of the United States. That is, where rights are given or preserved, or liabilities accrue under them whenever they affect or operate upon parties or actions, to such actions the judicial power of the United States extends. Here, then, the judicial power is determined in a class of cases by the subject matter of the action.

"The conditions, character, and citizenship of the parties to the action have nothing to do with the jurisdiction of the United States Courts. It will be seen that in this class of cases the *subject matter* and not the parties is the test of jurisdiction. *The Federal judicial power in such instances extends to* ALL *cases in law and chancery.*"

We claim, therefore, by the foregoing argument and authorities to have established that *under the Constitution*, State Courts can have no jurisdiction in cases where the subject matter is committed to national cognizance, and that in this case when Congress has legislated upon the subject of bankruptcy, the State legislatures and courts alike of necessity were ousted of all jurisdiction on the subject, without regard to the terms of the Act of Congress itself.

The wisdom of this provision of the Constitution has been repeatedly recognized.

Pomeroy, Constitutional Law, §§ 404-407.

Here, then, the argument might end, for the conclusion seems irresistible.

This cause of action has not and never had any common-law existence, but arises under a law of the United States (Cook v. Whipple, 55 N. Y., 1507). The judicial power of the national Courts shall extend to all cases arising under the laws of the United States, that is, they shall have exclusive jurisdiction of such cases, hence it logically follows, that the national Courts must have exclusive jurisdiction in this case, and therefore the cause of action could not be maintained in a State Court

IV.

The Bankrupt Act of 1867, by a just construction of its terms, confers exclusive jurisdiction upon the national Courts, and if, in the absence of such exclusion, State Courts might exercise concurrent jurisdiction in relation to matters arising under the Bankrupt Act,

nevertheless they are by that act effectually deprived of jurisdiction.

First: By the terms of the act the State Courts are excluded from jurisdiction.

In the first section, this act confers jurisdiction upon the District Court, in the second section upon the Circuit Courts.

14 Stats. at Large, ch. 176.
U. S. R. S., p. 969, § 4972.

In Goodall v. Tuttle, 7 N. B. R., 193, it was adjudged that Congress does not possess the power to require or compel the State tribunals to entertain suits in favor of an assignee for the collection of the assets of the bankrupt. The courts should not, therefore, construe the Bankrupt Act in such a manner as to necessitate assistance in its execution beyond the constitutional power of Congress to provide. In that case, Hopkins, J., in an opinion which argues against the intervention of any State Court, says: "But the act contains this further general authority to do all acts, matters, and things to be done under and in virtue of the bankrupt proceedings, without any word of limitation or restriction as to courts. Did not Congress intend by that, that all proceedings *necessary* to be done in virtue of the bankruptcy should be done in the Federal Courts? Suits against *third* parties to collect the debts and to collect the assets generally. Are not such suits included in the general terms as proceedings in virtue of the bankruptcy? Can it be maintained from anything in the act that Congress intended to leave the collection of the debts or any part of the assets to the agency of the State Courts, or that they intended to rely upon the instrumen-

tality of any other courts than those of federal origin for a complete administration of the law?"

Of a construction that requires the aid of a State Court, he says, "Such a construction is as destructive of the *uniformity* of the system they are empowered to establish as it is subversive of their intentions. * * By the proceedings and adjudication, jurisdiction is obtained of the bankrupt and his creditors, and the court making the adjudication is the only one according to the well-settled rules of all courts that can deal with the bankrupt, his creditors, and settle all conflicting claims, equities, and controversies arising between them. All such matters are *exclusively* within the jurisdiction of the court where the proceedings are pending. The power to collect assets is implicitly conferred by the first and recognized in the second and eighth sections, and authorizes an assignee in bankruptcy to sue for the collection of the assets in any District Court where it may be necessary to effect such collections." See also In re Alexander, 3 N. B. R. 6, Chase, Ch. J. Following this decision, this Court says, in Shearman v. Bingham, 7 N. B. R., 490, "Congress, in framing the Bankrupt Act, *intended to provide Federal instrumentalities for its complete execution*, and such as are sufficient to carry it into full effect. Congress intended to provide the means for the execution of the law *in all cases*. The intention of Congress was that the jurisdiction created by that act should, everywhere within the territorial limits of the United States, be exercised, and the law be administered by Federal tribunals and officers appointed under Federal authority. No act required to be done in execution of the Bankrupt Law can be named or

pointed out, which may not be done in the designated Federal tribunal, or by the Federal officer designated in the Bankrupt Law."

"In Ex parte Christy, 3 How., Mr. Justice Story, from whose opinion a part of the special grants of jurisdiction in the present act is copied, says, "The obvious design of the Bankrupt Act of 1841 was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an entire system adequate to that end should be provided by Congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunals over which it could not exercise no effectual control (p. 312). Congress did not intend to trust the working of the bankrupt system solely to the State Courts of twenty-six States, which were independent of any control by the General Government, and were under no obligations to carry the system into effect. The judicial power of the United States is by the Constitution competent to all such purposes; and Congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it might constitutionally do (p. 320). Besides, independently of the delays which must necessarily be incident to a resort to State tribunals to adjust the matters and rights affected by and arising in bankruptcy, considering the vast number of cases pending in those courts in the due administration of their own jurisdiction and laws, there could hardly fail to be a conflict of decisions as to the priority and extent of the various claims of creditors, pursuing their remedies therein in distinct and independent

suits, and perhaps also a different State tribunal of co-ordinate jurisdiction. These are but a few of the cases which may be put to show the propriety, nay, the *necessity* of the jurisdiction of the District Court to the full extent of reaching all cases arising out of the Bankrupt Act" (p. 321).

Story, J., in Mitchell *v.* Great Milling Works Co. (2 Story, 656), also says:

"The States may refuse to allow suits to be brought in their own judicial tribunal, arising under the laws of the United States, for many just reasons; first, that Congress are bound to provide such tribunals for themselves; secondly, that State Courts are not subject to the legislation of Congress, as to their jurisdiction; thirdly, that it may most materially interfere with the convenience of their own courts, and the rights of their own citizens, and be attended with great expense to the State, as well as great delays in the administration of justice, to allow their courts to be crowded with suits arising under the laws of the United States; and fourthly, as in the present case, that it would involve the State Court in almost endless examinations and discussions of the principles and bearings of the Bankrupt Law, confessedly a system novel in our jurisprudence, intricate in its details, and involving questions exceedingly difficult and complicated in its practical application;" and see also

Peck *v.* Jenness, 7 How. U. S., 621, 624.
McLean *v.* Lafayette Bk., 3 McLean, 190.
Moore *v.* Jones, 23 Vt., 746.

The foregoing decisions, except Shearman *v.* Bingham, and Goodale *v.* Tuttle, were under the old Bankrupt Act, but its provisions were similar

to those contained in the present act, and were not any more stringent.

This view is not defeated but strengthened by the fact that the fourteenth section saves actions pending.

Expressio unius exclusio alterius.

It will be observed that rights of action in two classes of cases are conferred upon the assignee by this section of the Bankrupt Act. The first class embraces unlitigated claims of the debtor; the other class substitutes the assignee for the debtor in actions pending.

In respect to the latter cases, the decisions relating to suits against consuls apply, that where an action is brought against a person of whom the court obtains jurisdiction, the court is not deprived of such jurisdiction by reason of the subsequent appointment of the defendant to a consulship.

Koppel *v.* Heinrichs, 1 Barb., 449.

In the former case, the *right of action* is one belonging to the debtor, and does not arise out of the Bankruptcy Law itself. And, further, if the right of action claimed in this case was conferred by this section of the act, what necessity was there for any other legislation upon the subject?

The general terms in which an act is couched are not sufficient to warrant an adjudication in favor of universal jurisdiction; for, in the Matter of Bruni, 1 Barb., 187, the construction of a United States statute, enacting "It shall be the duty of *any court or magistrate* having power to issue warrants to cause deserters to be arrested," was determined by the New York Supreme Court not to include State courts or magistrates.

Marshall, Ch. J., in Marbury *v.* Madison, 1 Cranch, 137, delivering the opinion of the court, makes this observation, which is applicable to this proposition: "Affirmative words are often in their operation negative of other objects than those affirmed." So we conclude that the grant of jurisdiction to the Circuit and District Courts is limited to them.

Second: Where a new right is given, which the party would not be entitled to but for the statute, the remedy afforded by the statute is exclusive.

Dudley *v.* Mayhew, 3 N. Y., 15.
Jordan Plank Road *v.* Morley, 23 N. Y., 554.
Thurber *v.* Blanck, 50 N. Y., 80.
Hollister *v.* Hollister Bk., 2 Keyes, 248.
Almy *v.* Harris, 5 Johns., 175.
Rex *v.* Robinson, 2 Burr., 799.

In the last above cited case, Lord Mansfield said, "Where a statute creates a new offence by prohibiting or making unlawful anything that was lawful before, and appoints a specific remedy against such new offence by a particular sanction and particular method of proceeding, that must be pursued, and no other." The New York Court of Appeals say, "The same rule is, no doubt, applicable to legal liabilities of a civil nature created by statute," and that it is "the universal rule of construction of statutes." *A fortiori*, where the claim has no inherent merit, and operates as a penalty.

Jordan Plank Road *v.* Morley, 23 N. Y., 554.
Almy *v.* Harris, 5 Johns, 175.
Voorhees *v.* Frisbie, 12 Am. Law R., N. S., 108.
Bingham *v.* Claflin, 7 N. B. R., 412.
Bedell *v.* Chase, 36 N. Y., 386.

If a penalty, it is governed by the rule that "a

crime is an offence against the sovereignty, and can only be taken notice of and punished by the sovereignty offended.

People *v.* Williams, 24 Mich., 156; 9 Am. R., 119.

It is a general principle, too, of policy, if not the customary law of nations, that no nation is bound to enforce the penal laws of another within its own dominions. The authority naturally belongs and is confided to the tribunals of the nation creating the offences. In a government formed like ours, where there is a division of sovereignty, and, of course, where there is a danger of collision from the near approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule, that each government should be left to enforce its own penal laws in its own tribunals.

Houston *v.* Moore, 5 Wheat., 69.

The courts of one country do not execute the penal laws of another.

The Antelope, 10 Wheat., 66, 123.
Ogden *v.* Folliett, 3 Term, 733.
Wolf *v.* Axholm, 6 M. & S., 99.
Warrender *v.* Warrender, 9 Bligh, 120.
Scoville *v.* Canfield, 14 Johns., 340.
U. S. *v.* Lathrop, 17 Johns., 9.
Story, Confl. Laws, § 620.
Pardessus Droit Com., 5 Art., 1467.

The Court of Appeals, in New York, have decided that this right of action is a new right given by Act of Congress.

Cook *v.* Whipple, 55 N. Y., 150.

Third: On general principles of the construction of statutes, the Act of Congress must be held to be exclusive, because assignees in bankruptcy are de-

pendent upon the national tribunals, and are independent of the State tribunals.

This fact alone is sufficient to demonstrate that the State Courts cannot entertain jurisdiction over statutory actions brought by them.

An assignee in bankruptcy is appointed by virtue of the Bankrupt Law itself.

Bump's Bankruptcy, 5th ed., 99.

His appointment or selection is subject to the approval of the judges of the United States Court.

In re Scheiffer & Garrett, 2 B. R., 179.

He may be removed in the discretion of that court.

In re Mallory, 4 B. R., 38.

All proceedings instituted by an assignee are regarded as being conducted by virtue of the authority which appoints him.

In re Blaisdell, 6 B. R., 78.

He is alone accountable to the court that appoints him.

Bump's Bankruptcy, 5th ed., 263.

State tribunals can neither interfere with nor interrupt the exercise of the authority of any judicial or ministerial officer appointed under or by virtue of the laws of the United States, and can neither control nor coerce his actions.

McKein *v.* Voorhies, 7 Cranch, 279.
Slocum *v.* Mayberry, 2 Wheaton, 1.
McClung *v.* Silliman, 6 Wheaton, 598.
U. S. *v.* Barney, 3 Hall's L. J., 128.
U. S. *v.* Peters, 5 Cranch, 115.
McNutt *v.* Bland, 2 How. U. S., 17.
Hopkins *v.* Stockton, 2 Watts & S. 163.

Therefore, the State Courts cannot in this case

enforce by mandamus or arrest, any order or judgment that might be made herein against the plaintiff, nor punish him for a contempt.

Fourth: This brings us to the consideration of another general principle of law against the right of an assignee in bankruptcy to maintain an action in a State Court.

The several States and the Federal Union are distinct and independent autonomies in their sovereign capacity, and their laws are foreign to each other, except in their surrendered powers.

Ohio L. & T. Co. *v.* D. Bolt, 16 How., 428.
Buckner *v.* Finley, 2 Peters, 590.
Bank of Augusta *v.* Earle, 13 Pet., 520.

In 16 How., the Court, after making the above exception, say, "The people of the several States are absolutely and unconditionally sovereign within their respective territories."

Under this principle it has been held that the State Courts never have jurisdiction of an action brought by a person acting in a representative capacity, appointed *in invitum* by a foreign tribunal.

This was so held as to foreign executors and administrators.

Vermilye *v.* Beatty, 6 Barb., 429.
Parsons *v.* Lyman, 20 N. Y., 103.
Williams *v.* Storrs, 6 Johns. Ch., 353.
Doolittle *v.* Lewis, 7 Johns. Ch., 45.
Vroom *v.* Van Horn, 10 Paige, 549.
Morrell *v.* Dickey, 1 Johns. Ch., 153.
Brown *v.* Brown, 1 Barb. Ch., 189.
Petersen *v.* Chemical Bank, 32 N. Y., 21.
Matter of Estate of Butler, 38 N. Y., 400.

In the Petersen case the Court say, "One ap-

pointed under a sister State of the Union is foreign in the sense of the rule."

This was so held with reference to the rights of assignees under foreign bankrupt laws.

Mosselman *v.* Caen, 34 Barb., 66.
Abraham *v.* Plestero, 3 Wend., 538.
Willetts *v.* Waite, 25 N. Y., 577, 586.
Harrison *v.* Sterry, 5 Cranch, 299.
Johnson *v.* Hunt, 23 Wend., 87.
Hoyt *v.* Thompson, 5 N. Y , 340.

This was so held in an action against a trustee appointed by a State Court.

Peale *v.* Phipps, 14 How., 368.

This was so held in the case of a voluntary assignee of an insolvent debtor.

Orr *v.* Amory, 11 Mass., 25.

This is the law as to receivers.

Booth *v.* Clark, 17 How., 322.

If the foregoing views are correct, as to the general principles, the following are corollaries justly to be deduced therefrom.

1. To affirm this judgment, this Court must adjudge that the State may have courts it cannot control; the courts may have suitors they cannot control, and may pronounce judgments they are powerless to enforce.

   This would present the unparalleled spectacle of a court above the State, and a suitor above the court.

2. To adjudge in this case that the State Courts have jurisdiction would be unnecessary, unwise, and unjust.

   Unnecessary, for the Federal Courts have

complete jurisdiction, and can do justice in in the case. Unjust, for the suitors would be subject to increased delay and expense in obtaining justice.

Unwise, for the dignity of the highest tribunal of the State would be unnecessarily subordinated to the United States Supreme Court, or else the uniformity of the law, which is one of its essential features, would be destroyed. And if the spirit that animated the founders of the Republic, and that still lives in their work, has been correctly apprehended, nothing could be more foreign to their intention, or more detrimental to the sovereignty and independence of the States, in the one case, or of the Union, in the other.

3. To hold that this action can be maintained, would be inconsistent with all former decisions. It has been shown that no right of action existed at common law, or under our State law, in favor of plaintiff, but that the right in the assignee in bankruptcy exists only by virtue of the Federal law.

The inventor stands in the same position.

Dudley *v.* Mayhew, 3 N. Y., 9, 17.
Morton *v.* Infirmary, 5 Blatchf., 116.

The Patent Law no more forbids him to invoke the aid of a State Court than the Bankrupt Law forbids the assignee to do so; but the State Courts have unanimously held that they have no jurisdiction over patent rights.

Dudley *v.* Mayhew, 3 N. Y., 9.
Livingston *v.* Van Ingen, 9 Johns., 582.
Parsons *v.* Barnard, 7 Johns., 144.

And although the United States, as a

political corporation, may enforce its common-law rights in a State Court, as any other State may, it cannot enforce its statutory rights in State Courts.

U. S. *v.* Lathrop, 17 Johns., 8.

V.

The light shed upon this question by the adjudications for and against State Court jurisdiction, may aid this Court in determining this question.

The most important decision rendered by a State Court in favor of State Court jurisdiction in Bankruptcy, is the case of Cook *v.* Whipple, 55 N. Y., 150. Important alike from the dignity, ability, and unanimity of the Court by which it was pronounced, the arguments by which the judgment was sustained, and the fact that it was the precedent upon which the case at bar was determined. Furthermore it is noticeable because from the opening sentence of the opinion, it appears that neither by pleadings, proofs, nor argument in the Court below, had the question of jurisdiction been raised, and yet in ignorance or disregard of the repeated reported refusals of this Court to examine this question under similar circumstances, the Court proceeded to discuss the question. After quoting part of Section 1 of the Bankruptcy Act, Grover J., delivering the opinion, the Court held: "The jurisdiction thus given depends wholly upon the act, and is *necessarily exclusive*, because independent; there is no jurisdiction in any tribunal over any such proceedings, and no original jurisdiction is given to any other. This includes all proceedings for adjudging any one a bankrupt" (p. 159).

The opinion admits that taking from the debtor the common-law right by which an insolvent debtor is permitted to give such preferences among his *bona fide* creditors as he may choose and conferring upon the assignee the right of recovering for the benefit of the other creditors the property transferred in its attempted exercise by the debtor, is conferring upon the creditors a *new right* (p. 162), and that this new right is given by the Act of Congress (p. 164). Therefore it is admitted that this right of action is in derogation of the common law, and was constitutionally created by Congress. This right of action, then, "depends wholly upon the act," and is "independent" of all other legislation, and "no original jurisdiction is given to any other" tribunal over it.

These are the reasons that lead the Court to hold that jurisdiction is "necessarily exclusive," in respect to proceedings for adjudging any one a bankrupt, and the same conclusion for the same reasons must be arrived at in respect to this action. Otherwise there is no reason for denying to State Courts the right to hear and adjudicate in all matters and proceedings in bankruptcy. To be logically consistent in its reasoning, that Court must hold that as to *all* actions and proceedings created by said act (including this action), the National Court has exclusive jurisdiction, or it has no such jurisdiction whatever.

This opinion not only admits that Congress gave a new right of action in this provision of the Bankrupt Act, but it also admits that it gave to the National Courts jurisdiction over such cause of action, the utmost claim in this or any other decision favoring State Court jurisdiction being that State Courts have *concurrent* jurisdiction.

Yet, with singular inconsistency, it cites and approves of the decision in Dudley *v.* Mayhew, wherein the same tribunal held that State Courts had no jurisdiction in patent cases, on the identical grounds that it rejects in this case. "The learned judge," says Judge Grover, "clearly demonstrated that this was a new right created by the act," just as Judge Grover had with equal clearness demonstrated in regard to this right of action, "and that the act gave an adequate remedy for its protection," as this act does, "peculiar in many respects, of which the parties could not avail themselves in other courts," more emphatically true of the Bankrupt than of the Patent Law; "and hence the conclusion that the act intended to make such remedy exclusive was correct" (p. 163).

This decision admits the great cardinal doctrine for which we contend: "The jurisdiction of the State Court is not based upon the Act of Congress, but wholly upon the Constitution and laws of the State" (p. 164). It shows that the laws of the State confer no jurisdiction upon the courts of the State over this cause of action. It is, therefore, based "wholly upon the Constitution," if at all; but the opinion unfortunately failed to inform us under what provision of the Constitution State courts obtain jurisdiction over Federal legislation.

In reaching the result attained, the New York Court of Appeals holds that this right of recovery is in no sense a penalty, and that the cases holding that State Courts have no jurisdiction of penalties given by Acts of Congress have no application, for the reason that "The *transfers* and titles based thereon are thereby made void."

That is to say, that Congress had the power to declare, by a new rule of law, that a transfer of title to real property, between citizens of the same State, was void by reason of events happening within four months thereafter.

The animus of the Court, to participate with the Federal courts in administering national legislation in this decision, is manifest from a consideration of the course of decisions of that Court upon another branch of the law. In the matter of Van Antwerp, 56 N. Y., 265, Church, Ch. J., delivering the unanimous opinion of the Court, says, in regard to taxation: "It is an indispensable power of all governments, without which they could not exist; and as public exigencies cannot be anticipated, so it has been found difficult to prescribe rules for its exercise. It cannot be denied, however, that experience has developed alarming abuses in the exercise of this power; and it is not improbable that the safety of the public may require that some constitutional restrictions shall be interposed: but, *until* this is done, *the judiciary cannot control its exercise.*"

Congress, to preserve the existence of this nation in the exercise of this indispensable sovereign and uncontrollable power of taxation (see Cooley, On Taxation, 320) enacted the Internal Revenue Law, which provided, among other things, that instruments for the conveyance of land should be stamped; and, to enforce that provision, further provided that conveyances not stamped as required should be void. The effect of this legislation, this same New York Court of Appeals was called upon to determine; and in Moore *v.* Moore, 47 N. Y., 467, it held *per curiam* that it was *not within the constitutional power of Congress* to de-

clare that a contract or conveyance between citizens of a State affecting the title to real estate is void, for the reason that such observance as affixing the requisite stamps had been omitted. "It is not in the constitutional power of Congress to prescribe for the States a rule for the transfer of property within them" by which to raise money to fight for the national life; but it is within the constitutional power of Congress to prescribe for the States a rule for the transfer of property within them, to defeat the attempt of a debtor to make preferences among his creditors. In the Moore case the nation is forbidden to cross the threshold of the State; and in the Cook case the nation is denied the right to prevent State interference in national affairs.

By reason of the unmistakable opposition of that Court to certain national political legislation, as shown in the foregoing, and the decisions in respect to taxing Government bonds in the Tax commissioner's cases (see Bank of Commonwealth *v.* Mayor, 43 N. Y., 184), and in respect to usury in the National Bank Act, in First National Bank *v.* Lamb, 50 N. Y., 95, and Farmers & Mechanics' Bank *v.* Dearing, 1 Otto, 29, it must be apparent that on the question now discussed, the decision of that Court must serve as a warning, not as a guide.

We do not present this suggestion as a reflection upon that individual court, but as the necessary and inherent tendency of the antagonism between State and National courts, for we entertain the most profound respect for that tribunal, when deciding questions on State law. Nor are these remarks intended to apply to the Court of Appeals of the State of New York alone, but these

decisions are cited and that Court instanced only to illustrate the inevitable tendency of the judicial branch of the State government to adhere to the traditions of the people from the foundation of the republic.

In Pennsylvania, in Mays *v.* Manufacturers' Bank, 64 Pa., 74, the Court declared the Bankrupt Act to be an "unjust and cruel law;" whereas a representative commercial body in the City of New York, petitioning Congress not to abolish the law, resolved that this Act was beneficial to all concerned, and had advanced the standard of mercantile morality.

Nor is this antagonism of recent origin. In the famous case of Gibbons *v.* Ogden, 9 Wh., 1., the Supreme Court lay down principles that to-day are elementary, but that decision reversed the Supreme Court and the Court of Errors in New York (S. C., 17 Johns., 488, and see 1 Kent, Com., 432).

The counsel for the respondent in the Cook case admitted away the strength of his position by assuming that Congress had a *discretionary power* to confer upon Federal courts exclusive jurisdiction of all matters connected with bankruptcy. Our position is, that the Constitution confers no discretion of the kind upon Congress, but gives only the option to pass or refrain from passing such law. When Congress enacts no bankrupt law, the national courts have no jurisdiction over the subject; when Congress enacts a bankrupt law, the State courts have no jurisdiction over the subject so far as that law reaches.

The exact claim of the State court is, If Congress legislates on the subject, the State can interfere; if Congress does not legislate, the nation cannot.

It is not deemed profitable to analyze separately the other decisions wherein State courts have entertained jurisdiction over actions to which assignees are parties. But they may be classified as follows:

First.—Cases wherein the question was not discussed by Court or counsel. These have no value in determining this question.

Second.—Cases wherein the action was brought against a debtor, who was declared bankrupt, and an assignee appointed *pendente lite*. These cases are constitutionally provided for by the Act, as already shown.

Third.—Cases wherein the action was brought *against* an assignee in bankruptcy. These cases are clearly distinguishable from this case.

Fourth.—Cases wherein the action is brought by an assignee to enforce a common law right obtained by virtue of the assignment—actions which might be brought by them individually.

Fifth.—Cases wherein the action is brought by an assignee to enforce a statutory right, such as this. This latter class may be subdivided into two classes. The first, where the question of jurisdiction was not raised by the pleadings or upon the trial; in these cases this Court has repeatedly refused to examine the question. The second class present the question in a legal manner; of these, this is the first case that has been brought before this Court.

In the following cases this Court has refused to entertain this question when first presented in the Appellate Court:

Mays *v.* Fritton, 20 Wall., 418.
Brown *v.* Clarke, 4 How., 4.

Phelps *v.* Mayer, 15 How., 160.
Turner *v.* Yates, 16 How., 14.
Camden *v.* Doremus, 3 How., 515.
Bank *v.* Kennedy, 17 Wall., 19.
Read *v.* Gardner, 17 Wall., 409.
Ray *v.* Smith, 17 Wall., 412.
Ins. Co. *v.* Folsom, 18 Wall., 237.
Town Ohio *v.* Marcy, 18 Wall., 552.
Lucas *v.* Brooks, 18 Wall., 436.
Shuttle *v.* Thompson, 15 Wall., 151.
Prout *v.* Roby, 15 Wall., 472.
Scott *v.* Kelly, 12 N. B. R., 96.
Mays *v.* Fritton, 11 N. B. R., 229.

This case does not come within the rule laid down in Mays *v.* Fritton, wherein Mr. Justice Hunt, delivering the unanimous opinion of the Court, says of the question of jurisdiction: "To be available here an objection must have been taken in the court below. Unless so taken it will not be heard here. It is not competent to a party to assent to a proceeding in a court below, take his chance of success, and upon failure come here and object that the court below had no authority to take the proceeding."

In the following cases it has been held that State Courts have no jurisdiction:

Bingham *v.* Claflin, 7 N. B. R., 412.
In re Brinkerman, 7 N. B. R., 421.
Phelps *v.* Silleck, 8 N. B. R., 390.
In re Anderson, 9 N. B. R., 360.
Augustine *v.* McFarland, 13 N. B. R., 7.
Voorhees *v.* Frisbee, 25 Mich., 476, 12 Am. R., 291; 12 Am. L. R., N. S., 108.
Hanson *v.* Herrick, 100 Mass., 326.
Newman *v.* Fisher, 37 Md., 259.
Markson *v.* Hovey, 47 Ind., 31.

Voorhees *v.* Frisbee was an action by an assignee in bankruptcy to set aside a conveyance, on the ground that it was made in fraud of the Bankrupt

Act. The trial court entertained jurisdiction, the defendant appealed, and the appellate court unanimously reversed the judgment below.

The opinion argues against State jurisdiction with such masterly ability, such clear comprehension of the provisions of the Bankrupt Law, and such just appreciation of the relations of State and national tribunals to each other, and of the conflicts that might arise from concurrent jurisdiction, such proper vindication of the dignity of the State Courts, that this court is respectfully solicited to examine the case, for the whole opinion deserves careful perusal, and no extract would do it justice.

In Augustine *v.* McFarland, the Court says: "Were we compelled to go back to the Bankrupt Act itself for its meaning, I should be compelled to hold the jurisdiction of the Bankruptcy Court as to all the matters enunciated in the first section of the act, among which are 'all acts, matters, and things to be done under and in virtue of the bankruptcy.' This jurisdiction being exclusive, neither the Bankruptcy Court nor the parties to the proceedings could divest that jurisdiction or confer it on any other tribunal; and all proceedings in the State Court on any of the matters enunciated in said section were absolutely null and void. That Congress, having the constitutional power to establish uniform laws on the subject of bankruptcy, has seen proper to select the Federal Courts as the tribunal in which such laws should be administered, and has expressly conferred that power on those courts, and by no implication can the State Courts take any of that jurisdiction."

In State *v.* Trustee, 65 N. C., 714, the Court say, "We agree that the only jurisdiction actual-

ly conferred by that act is with District and Circuit Courts of the United States."

Newman *v.* Fisher was an action by creditor by attachment against debtor's property. Defendant pleaded title as assignee in bankruptcy before attachment issued. Plaintiff claimed that proceedings in bankruptcy were void. *Per curiam*, Robinson, J. "The 1st section of the Act of 1867 provides that the several District Courts of the United States shall have original jurisdiction in proceedings in bankruptcy, and this is followed by a general provision extending such jurisdiction to all acts, matters, and things to be done under and by virtue of the bankruptcy until the final distribution and settlement of the bankrupt estate. The jurisdiction hereby conferred on the federal courts is *superior and exclusive* in all matters arising under the statute, and from the time proceedings in bankruptcy are begun the District Court has jurisdiction over the bankrupt, his estate, and all questions connected therewith. The Bankrupt Act having been passed in pursuance of the Constitution of the United States, whenever by express words or necessary implication it affects the jurisdiction of State Courts, or the remedies of suitors therein, they must yield to the *paramount law*. By it only is original jurisdiction in matters of bankruptcy conferred by the Act of 1867 upon the Federal Courts; but *it would* be inconsistent with the plain purpose of the *law and destructive of the system itself to permit creditors*, by resorting to State tribunals, to withdraw, against the will of the bankrupt court, property or cases belonging to the jurisdiction of that court. Moreover, if the contention of appellant be correct, we should have the State Courts deciding one

way and the Federal Courts another, thus inevitably leading to a conflict of jurisdiction which it was the obvious policy of the law to avoid."

In Markson *v.* Hovey, assignees were made parties defendant in a foreclosure suit. They then applied for a stay of proceedings. The Court said: "If State courts were to take jurisdiction in such cases, the consequences would be disastrous. Two different tribunals, adjudicating upon the same matter, might decide the same question in different ways. This is more likely to be the case in respect to questions of fact, especially where there are jury trials. But, what is worse, different sales of the same property, made under the authority of two different tribunals, each claiming to have jurisdiction of the subject-matter, would lead to profitless litigation, involving questions of conflict of jurisdiction. All these evils may be avoided by recognizing the legal proposition that where a court of bankruptcy has thus first acquired jurisdiction, that jurisdiction is exclusive so long as the proceedings in bankruptcy are pending.

"A case has been cited to show that assignees in bankruptcy may go into a State court to set aside a fraudulent conveyance, made by the bankrupt (Gilbert *v.* Priest, 63 Barb., 339). The case does not seem to be in point here, for it would by no means follow that a State Court could take jurisdiction of matters rightfully pending in the court in bankruptcy. The current of decision, so far as we are advised, would seem to establish the proposition that State Courts have no jurisdiction in such cases. (Newman *v.* Fisher, 37 Md., 259; Bingham *v.* Claflin, 31 Wis., 607; Voorhees *v.* Frisbee, 25 Mich., 476.)"

We submit that the weight of authority and the cogency of reasoning, by which all decisions are to be ultimately judged, alike uphold the proposition, for which we contend, that State Courts have no jurisdiction in cases similar to the one at bar.

VI.

The complaint was properly demurred to, because it does not state facts sufficient to constitute a cause of action.

The Code of Procedure of the State of New York, by which the practice in this action is governed, provides (Section 144) that a defendant may demur upon several grounds, one of which is, as above set forth, that the complaint does not state facts sufficient to constitute a cause of action.

The question is duly raised as matter of law, by using the words of the Code.

Haine *v.* Baker, 5 N. Y., 357.

It is contended, on the part of the plaintiff in error, that the complaint in this action is radically defective in seven essential particulars.

First.—The complaint alleges that the defendant commenced an action against the bankrupts on three promissory notes. It does not state that they were makers or indorsers on such notes, that they were the only parties to the notes, or sole defendants in the action. The allegation of the complaint might be true, and there might have been a dozen other parties liable on those obligations and parties defendant in the action.

Second.—The complaint alleges that the bankrupts

suffered the defendant to obtain judgment by default, but it does not state that such judgment was obtained against the bankrupts. There can be no question that the suffering of judgment against somebody else is no offence, even if it had the effect to give defendant a preference over other of the creditors of the bankrupt.

Third.—It alleges that on the 2d of June, 1870, the amount of the judgment was collected by the marshal; but does not state from whom, out of whose property, or by what marshal.

Fourth.—After statement of the adjudication of bankruptcy, the complaint alleges that the defendants prior to the commencement of such proceedings, collected from the bankrupts the sum of one thousand nine hundred and thirty-five dollars and fifty-seven cents, without stating when or how, and without connecting that transaction with any other part of the complaint.

Fifth.—The allegation of the complaint is that the defendant *suffered* judgment; the law requires that the debtor shall *procure*. (See 35th Section.)

Something more than passive non-resistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property, when the debt is due and he has no defence.

Wilson *v.* City Bank, 17 Wall., 473.
Mays *v.* Fritton, 20 Wall., 414.

In Sleek *v.* Turner, 76 Pa., 142, the Court held that "Mere passive non-resistance in an insolvent debtor will not, under the Bankrupt Laws, invali-

date a judgment and levy on his property, when his debt is due and he has no defence.

"Though the judgment creditor may know the insolvency of the debtor, his levy and seizure are not void, nor any violation of the Bankrupt Law."

Witt *v.* Hereth, 13 N. B. R., 106.
Partridge *v.* Dearborn, 9 N. B. R., 474.
Bentley *v.* Wells, 61 Ill., 59; 14 Am., 53.

It is contended by counsel, in Mays *v.* Fritton, 20 Wall., 418, that the case of Buchanan *v.* Smith is not now regarded as of any authority; and in Partridge *v.* Dearborn, 9 N. B. R., 474, Judge Lowell, after attempting to reconcile this case with Wilson *v.* City Bank, concludes that if they cannot be thus explained, the earlier case is overruled.

Sixth.—There is no statement that the assignee has become qualified to sue under the 14th Section of the act.

This section provides that as soon as the assignee is appointed *and qualified*, the judge or Register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, and *thereupon*, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee.

This must be complied with in cases arising under the 35th Section, as well as in any other case.

Buchanan *v.* Smith, 16 Wall., 306.

If the decision in Cook *v.* Whipple, 55 N. Y., 150, heretofore cited, properly holds that the effect of the 35th Section of the Bankrupt Act is to

render nugatory the transfer of the debtor's property, and to leave the title in him; then the property taken by the plaintiff was held by him for the debtor, and the assignee needed a transfer of such title from the court to enable him to sue. If, on the other hand, the decision in Voorhees *v.* Frisbee, 25 Mich., 476, that this is a penalty, is correct, then no statement of facts can be made sufficient to show a cause of action in the State Court. The only remaining class of assets to which it could belong is rights of action of the debtor, which may vest in the assignee without the transfer requisite under the 14th Section; but, in respect to this matter, the debtor had no right of action.

Not only is jurisdiction over the subject-matter, to which this action pertains, exclusively vested by the Constitution, when exercised, in Congress; not only is the right of action new and purely statutory by Act of Congress; the only party who can prosecute such action is an officer of the federal court, by virtue of his office.

He cannot sell, assign, transfer, convey, devise, or bequeath this right.

In Voorhees *v.* Frisbee, the Court say: "The present case is one where no cause for (equitable) interference could exist in this State in favor of private parties upon the facts alleged. No creditor, who has not obtained a lien or judgment, and who has not, in seeking to enforce that lien in the ordinary way, found it necessary to assail the conveyance of his debtor's property as fraudulent, can complain of it."

Seventh.—The allegations that follow the language of the statute, in respect to the violation of the 35th Section of the Bankrupt Act, are bad as matter of

pleading under the New York Code of Procedure, because they do not state the facts, but only conclusions of law, and therefore the complaint does not state facts sufficient to constitute a cause of action.

This is the rule in bankruptcy.

Jones *v.* Howland, 49 Mass., 8 Met., 377.
Matter of Pearce, C. Law R., 261.

It is also the rule in the State court.

Code of Procedure, § 142.
See 1, Wait's Practice, 520.
Wheeler *v.* Allen, 51 N. Y., 37.
Matter of Faulkner, 4 Hill, 601.
McAllister *v.* Pond, 15 How. Pr., 299.
Brown *v.* Harmon, 21 Barb., 508.

This point gives an additional illustration to the position heretofore taken, for if this Court should hold that the State court has jurisdiction of this cause of action, it must apply to it the practice and procedure of the State courts. The sufficiency of the pleadings and the regularity of the practice cannot be determined by the provisions of the United States Revised Statutes, the rules and practice of the National courts, but by the State law, regulating State practice; and when it is determined that the State courts, with all their varied codes of practice, their different rules of evidence, their distinct forms of appeal, can exercise jurisdiction in cases like the one at bar, the uniformity that the Constitution demands under the Bankrupt Law is effectually and forever destroyed, for a practitioner educated under a code could not use his pleadings in a court organized under the common law, nor could a common-law practitioner use his pleadings under a code.

VII.

The judgment appealed from should be reversed, and the proceedings be remitted to the Supreme Court of the State of New York, Second Department, County of Kings, with directions sustaining the demurrer, and granting the plaintiff in error herein, judgment absolute against the defendant in error with costs.

WM. HENRY ARNOUX,

Of Counsel.

In the Supreme Court

OF THE UNITED STATES.

HORACE B. CLAFLIN,

Plaintiff in Error,

against

JULIUS HOUSEMAN,

Defendant in Error.

Points for Defendant in Error.

WILLIAM RUSSELL,

Atty for Defendant in Error.

B. F. Lee

Of Counsel.

NEW YORK:
MUNROE & METZ, LAW PRINTERS, 60 JOHN STREET.
1876.

Supreme Court,

OF UNITED STATES.

HORACE B. CLAFLIN,
Plaintiff in error,
agst.
JULIUS HOUASMAN,
Assignee in B'kruptcy.

Points for Defendant in error.

PRELIMINARY OBJECTIONS.

1. The writ should be dismissed for want of jurisdiction.

1. Under the 23d Sec. of the Judiciary Act, where State Courts interpret or *give effect* to acts of Congress, their decision must be *against* the validity of the act, treaty or constitution, *and not in favor of it*, to authorize any cognizance by a Federal Appellate Tribunal.

Bryan *v.* Thomas, 4 Wall, 604.
Burke *v.* Gaines, 19 How. 388.
McDonough *v.* Millandon, 3 How. 693.
Fulton *v.* McAffee, 16 Peters, 149.
Linton *v.* Stanton, 12 How. 423.
Gordon *v.* Caldcleagh, 3 C. R. 268.

2. A writ of error will not lie from the Supreme Court of the United States to a State Court, in an action brought by an assignee in a State Court against those who have paid receivers.

Long *v.* Converse, Sup'm Ct. U. S., Oct. Term, 1875.

3. Plaintiff in error appeared generally in the State Court; did not attempt to *remove the litigation to the Federal Courts*, on either the ground of variant citizenship of the parties—which appeared on the face of the complaint—or on the ground of want of jurisdiction of the subject matter; and the decision sought to be reversed is not *conclusively* repugnant to any right of plaintiff in error, unless it be the choice of forum—which he had waived by proceeding, or his refusal to answer on the merits—which he declined. The State Court could not have held jurisdiction against his will, for the defendant in error was a citizen of Michigan, and the proper proceedings having been taken, the suit would have been transferred *ipso facto*, (Durham *et al*, *v.* Baird *et al*, Sup. Ct., Pa., July 29th, 1875) and without the concurrence of the State Court. If the Appellate Court were in doubt whether or not the State Court had jurisdiction of the subject matter, it would decline to decide the question, when it must disregard, as against plaintiff in error, the equitable estoppel of his appearing generally in the State Court, instead of removing the litigation, at the earliest possible moment to a Federal tribunal.

Scott & Nasse, assignees, *v.* Kelly, late Sheriff, &c., Supreme Court U. S. Oct. Term, 1874.

Ayres *v.* West'n R. R. Co. 32 How. 71, and 25 Barb. 333.

McCormick *v.* P. C. R. Co. 49 N. Y. 303.

4. If it be claimed that the general appearance was an inadvertance, appeals in such cases are not to be encouraged. The large amount required to be involved before an appeal from the Circuit to this Court—an amount larger than that involved in this controversy—indicates an intention to discourage appeals to the Court of last resort, as the lesser of evils.

Moers *v.* Morro *et al.* 17 How. 280, and
" 29 Barb. 361.
Act Mch. 2, '67, Sect. O.

5. An assignee is estopped from attacking a foreclosure sale in a State where he has appeared in the action. Augustin *v.* McFarland, 13 N. B. R. 7 to 14. Why not plaintiff in error?

First Point.

Should, however, the Court hold that the writ lies, it must yet be held that the State Court had jurisdiction OF THE PARTIES.

1. The plaintiff in error was served within its jurisdiction, and nothing appeared on the face of the complaint to show that he was exempt from process. His demurrer was not a speaking demurrer; and there is no reason to infer that its overruling, coupled with *leave to answer* on the merits, was not on the ground that it struck at formal defects and matter of amendment rather than matter of substance. The leave to answer implies as much. Besides, objections to matter of form should have been made below. First Nat. Bank *v.* Colby, U. S. Supreme Ct., Oct. Term, 1874. If the allegations of the complaint had been too general in regard to the assignee's character, in which defendant in error sued, they could, and should, have been made more definite and certain by motion.

No substantial right is involved in ordering or refusing to order a pleading to be made so.

Faulks *v.* Kamp,

2. The *defendant in error* stood in the shoes of Comstock & Young, who were *prima facie* entitled to sue in the State Court, and although a *quasi* officer of the U. S. District Court of Michigan, he must be presumed, until the contrary appears, to have submitted to the jurisdiction by order of the District Court, for the purpose of the litigation. Objection to his capacity to sue cannot be heard where the cause of demurrer stated is that given by Subdivision 6, Sec. 144 N. Y. Code of Procedure.

Vibert *v.* Frost, 3 Abb. 120.
Hobart *v.* Frost, 5 Duer, 671.
Phœnix Bk. *v.* Donnell, 40 N. Y. 411.
Fulton Fire Ins. Co. *v.* Baldwin, 37 N. Y. 648.
Hotchkiss *v.* Elhing, 36 Barb. 39.

3. If he were not entitled to this presumption, and acting without leave of the Court which appointed him, his official misfeasance is matter to be shown the District Court to induce restraint over him personally, and in no manner prevented the State Court controlling him, (so far as any non-resident can be controlled), as a suitor seeking relief at its hands. If Courts were held to lose jurisdiction of rights of action because the persons suesing were either without the jurisdiction, or the final process in enforcement of judgment *might* not be efficient, or had, in like cases, *proved* inefficient, they would be transf rmed from Courts of Law or Equity into vaticinating tribunals, and the best prognosticator would be the greatest authority. Courts do not refuse themselves cognizance of suits brought *by* foreign governments, where these submit questions to them, although unable to execute final judgment *in personam*, or by process of contempt.

Yet there can be no pretence of their capacity to coerce in the last event, or do more than operate on the *res* within their territorial jurisdiction.

As to *this*, even if a government voluntarily come in and defend, there is grave doubt, in cases where property *in specie* is subject matter.

The English Court of Chancery could scarcely attach, except as reprisal and an act of belligerency, the property of the U. S. floating on the Thames, or deposited with our Fiscal agents in London, to satisfy judgments for costs in the national suits brought by the U. S. to recover in the Cotton Cases from the Confederate agents.

McDabney, 3 Abb. S. 4. 69.
The Pezzao, 10 N. Y. L. Obs. 97.

4. But the 14 sec. of the bankrupt act *expressly* confers rights of action on assignees in bankruptcy, *as such*, in actions pending in State Courts and authorizes them to pursue remedies, or defend actions in those tribunals, not merely to liquidation by judgment, but by substitution for bankrupts on appeal, sec. 14. If they may litigate as assignees in bankruptcy under the 14th sec., how does their official character become too sacred to be entrusted to the State Courts under the 35th sec.? Where there is so palpable a submission of their official character *in and by the very words of the act*, it is reasonable to require the production of some subsequent and irreconcileable withdrawing clauses in the statute to show *that congress meant to be inconsistent*.

5. The character of assignee is *personal* as well as *quasi*-official, and if admitted, as by demurrer, plaintiff in error can take nothing by the assignee's submission of his right, *in autre droit*, to the State Court.

The assignee had an election. It was personal to him for all the State Court could know, from the pleadings, to the contrary. He exercised it. The plaintiff in error made no effort to remove the action.

It is now too late to object to the power of the State Court to render judgment.

May *v.* Fritton, U. S. Supm. Ct. Oct. Term, 1874.

Second Point.

The complaint set out issuably sufficient matter to constitute a *prima facie* cause of action.

1. The Court below was required by Sec. 2, Art. VI of the Federal Constitution, to take judicial notice of the act of Congress, known as the Bankrupt Act, and every one of its provisions ; amongst these, that the assignee, when appointed as alleged, was entitled to recover, as such, all sums of money paid fraudulently or suffered to be recovered, on execution or otherwise, by the bankrupt, within four months preceding adjudication, the time when the alleged cause of action arose.

Beals *v.* Quin, 101 Mass. 262.
Forbes *v.* How., 102 Mass. 428.
Peiper *v.* Harmer, 5 N. B. R. 252.

2. In reference to the decisions since the Amendatory act of June 22d, '74, implying that *knowledge*, as distinguished from "reasonable cause to believe," must be shown. *Singer, assignee, v. Sloan*, N. B. R. Vol. XI. pp. 433, *et sequitur*, holds that Congress designed that past transactions in cases under section 35 of the *former* act (under which this action was brought), *should not be interfered with, so far as time was an element.* "Sec. 10, changing the time as to fraudulent preferences from four to two months did not take effect until two months after the passage of the act." *Bradbury v. Galloway*, N. B. R. Vol. VII. p. 299. Again, the recent decisions creating a distinction between knowing and knowledge of a reasonable cause to believe, &c., do not apply to this case, for

the "knowing" *was alleged in the complaint, and stands admitted by the demurrer.*

3. But the demurrer also admits the allegation of the complaint that plaintiff in error, knew and had reasonable cause to believe that *the preference was in fraud of the provisions of the act.* This is a substantive admission and gives certainty to the pleading, and when admitted is more than a simple conclusion of law. If guilty knowledge exist actual fraud must also exist.

Singer, assignee, *v.* Sloan, N. B. R., 11, 441.

"It is an elementary rule of pleading, that when "a *state of facts* is relied on, it is enough to allege "it simply, without setting the subordinate facts "which are the means of producing it, or the evi- "dence sustaining the allegation."

Williams *v.* Wilson, 8 Ad. & El. 314.

"Fraud consists in intention, and intention is a "fact which may be alleged."

Moss *v.* Riddle, 5 Cranch, 351.

"Fraud is a traversable *fact.*"

5 Sand, 566.

4. The allegation of the adjudication of Comstock & Young, and the appointment "duly" of defendant in error, was fortified by the context referring to the act, which set out all requisite conditions precedent required to be performed before the bringing of suit. It was pleading so much of the act as referred to appointment. When the allegation was, that the plaintiff sued by a "guardian duly appointed," it was said "if the statement was deemed too general, the proper course was to move to make it more certain." *Sere* v. *Coit*, 5 Abb. 482; and when the allegation was that plaintiff was

"duly appointed Chamberlain," it was held sufficient on demurrer.

Platt *v.* Stout, 14 Abb., 178.
People *v.* Ryder, 12 N. Y., 433.
Hoyt *v.* Thomson's Exrs., 19 N. Y., 208.
Cuger *v.* Halliday, 3 Ed., Ch. R., 570.
Boon *v.* Hall, 7 Bush, Ky., 66.

5. An assignee in bankruptcy acquiring title to lands, by virtue of the Bankrupt Act, pending a litigation in a State Court concerning them, *takes subject to the final decree of that Court.*

Eyster, Plff. in Error, *v.* Geff, Deft. in Error, U. S. Sup. Ct. Oct. Term, 1875.

6. Allegations necessarily implied must be denied according to State practice.

Grindle *v.* Carruthers, 15 N. Y., 429.
Bellanger *v.* Craigue, 31 Barb., 534.
Lord *v.* Cheesboro, 4 Sands, 696.
Haight *vs.* Holly, 3 Wend. 263.
Anable *vs.* Steam Eng. Co., 16 Abb., 286, and 11 East. 406.

7. Congress cannot prescribe rules of evidence or practice, or determine *sufficiency* of evidence, for State Courts.

People *vs.* Gates, 43 N. Y. 40.
Moore *vs.* Moore, 47 N. Y. 467.
Quin *vs.* Lloyd, 1 Sweeney 253, 257.
Carpenter *vs.* Snelling, 97 Mass. 452.

Whether there be any evidence of a fraudulent preference under the Bankrupt Act is a question for the Court.

Ross Servins' assignee *vs.* Redfield, N. Y. Sup. Ct. Gen. Term, 4th Dept. Jan'y, 1876.

Third Point.

But it is contended that the Court below had no jurisdiction of the subject matter, and, therefore, that the complaint did not, however formally sufficient, state facts sufficient to constitute a cause of action. What was the subject matter? Simply a claim to recover money, by way of damages, for fraud and collusion with a debtor. *Presumptively* such a cause is within the cognizance of Courts of general jurisdiction, so called, proceeding by the course of the Common Law, in the original States; and to succeed, plaintiff in error must show, affirmatively, that their jurisdiction has been limited. This is especially true where the ouster sought is in favor of statutory Courts, however exalted, operating under a written Constitution of delegated powers.

Judiciary Act, 1789.
Federalist, No. 82
Delafield *v.* State of Illinois, 2 Hill, 159.

1. It has not been limited by *the Bankrupt Act* referred to in the complaint, as we have seen that the 14th Sec. allows assignees to submit their rights *as* such to the State Courts, which, *ex vi termini*, must cover all submitted subject matter in which they *can* be interested.

2. "It is not the purpose of the Bankrupt Act to *abate* suits, commenced before bankruptcy, in which title to the property surrendered by the Bankrupt is in litigation."

Jackson, assignee *v.* McCullough, 13 N. B. R. Rep. pp. 283, 285.

But if the jurisdiction of the State Courts over the subject matter is not ousted by the *appearance* of an assignee in Bankruptcy, *it must remain.* That it *might* remain *it must have attached origi-*

nally, because there was no inhibitory statute. But if there was no inhibitory statute, and no *abatement* arising out of subsequent legislation, the jurisdiction was perfect *at all times* from the initiation, and must remain perfect at all times, to the determination, (as between the contending parties), *of the right to the subject matter.* Evidently, plaintiff in error can find no authority for his theory *in the only law referred to in the demurrer to pleading.*

4. Is there any authority *outside of it*, showing exclusion of jurisdiction as to subject matter?

We think not.

The admitted "supremacy" of laws passed in pursuance of the U. S. Constitution would, in itself, not justify a conclusion that any *conflict* existed between such laws and *any* other laws whatever. A conflict must be shown to exist before the question of supremacy can arise. A conflict implies repugnancy. Where repugnancy exists supremacy is with the laws passed in pursuance of the Constitution, and their operation becomes exclusive The Constitutional power to pass laws "for the establishment of a uniform system of bankruptcy" is certainly not repugnant to the power of the State Court and their duty to *recognize and sustain them as of binding obligation on all Courts.*

The grant, therefore, only excludes them from recognizing or enforcing laws *repugnant to the uniform system.* The 32d section of the Judiciary Act, as we have seen, denies to Federal tribunals the right of reviewing the decisions of State Courts, where the decision of these courts is "*in favor* of the Act, Treaty or Constitution" in controversy.

What law, repugnant to the uniform system, did the Court below enforce in giving judgment on the demurrer? None *had been pleaded.* The Court was asked to discover one for the demurrant. It was required not alone to discover a speaking inhibitory statute or organic law, but to go through

a soritical process of reasoning to apply it, when discovered, to the object. It was not pretended that the Constitution *expressly* declared "the power to establish a uniform system of bankruptcy," inconsistent with the authority of non-Federal Courts *to recognize it when established.*

It was only claimed that the State Court, as matter of incidental cognizance, should have drawn *suo sponte*, from the organic law, an implication of exclusive jurisdiction in Federal tribunals. But how is incidental cognizance to be defined? If State Courts may, or must, incidentally, or otherwise, give *effect*, by interpretation, to the *Bankrupt act*, by what reasoning is their incidental cognizance of the *patent* want of words of exclusion in the constitution to be denied and rendered subject of review, as if "*not in favor of*" the Constitution, even when they enforce the act passed under, and the system established in admitted pursuance of the Constitution?

Fourth Point.

But it is argued that the power to *establish* a *uniform* system carries with it, in its execution, by inevitable consequence, the power to *establish* Courts to administer it *exclusively*, that it may be uniform.

The Appellate Court takes notice that no new Courts have been *established* for the specific purpose. No Courts have been established which had not existence before the passage of the first Bankrupt act. Registers have been created; but Registers are mere functionaries limited to powers of certification and the like. Congress has evidently established the system solely by *the passage of the act*, relying on its being a supreme law for Courts and judges, and, therefore, as far a uniform system

as if new Courts were established, or only Federal ones permitted to give effect to it. This is our claim.

IV. A system is uniform which is consistent with itself and produces the *same results uniformly*. The result of the Bankrupt act and system, is *pro rata* distribution of assets. Its initiatory process is the *adjudication* of bankruptcy. Given the initiatory power to adjudicate, and the final authority of distributing *pro rata* to the District Court, as provided *explicitly* in the act, is not all the uniformity possible, or needed, secured? And when the Court below held that the assignee, in right of the adjudication by the District Court, was entitled to possession of assets, that he might distribute them *pro rata* under the order of the District Court, was it not furthering, instead of disturbing the uniformity of the system? Rules of action, rather than identity of agents, secure uniformity of result, and the decision of the demurrer shows that the uniform rule of action selected by Congress was held obligatory *just so far as it had been established*. Repugnancy in *operation*, therefore, cannot be claimed in this appeal except as a philosophical theory.

Fifth Point.

Failing to show exclusion of the subject matter —the collection of a debt by an assigne in bankruptcy affirmatively, by statute or organic law; failing to show it by a *controlling* implication of repugnancy between "a uniform system" of bankruptcy and the *recognition* of the system by the State Court in the case at bar, plaintiff in error is forced to resort to arguments by analogy, arguments *ab inconvenienti* and arguments which, we must denominate, of the better wisdom.

1. As to the arguments by analogy, his statement "that Courts cannot adjudicate where the law making power cannot legislate," is applicable so fas as true; but it is only true of derivative statutory bodies, taking by express grant certain powers and their incidents, and is *not* true, and never has been true, of state Courts of the dignity of the Courts below. If no statute existed to meet a possible case, the State Courts, in the original states, with equitable cognizance, could eke out an equity and enforce a remedy. They did so before the Federal Constitution became operative. Not so Federal Courts, which require the Constitution and statute at every jurisdictional step, and in applying remedies as well as taking jurisdiction. The distinctions between exclusive patents and inclusive patents are matter of common knowledge, and afford the only partial analogy which occurs to us, and these make for our claim. As to Consuls, they are *expressly* exempted from State jurisdiction, civilly or criminally, by Art. 3, sec. 2, sub. 1, so that actions cannot be brought *against* them in State Courts, but the *bringing* of an action *by* an assignee affords no analogy.

2. The arguments of inconvenience are not tenable. Congress might have (under the claim of right to control by a special judicatory the *acquisition* of bankrupt assets, as well as those in *possession*,) attempted to withdraw all litigation having reference to the acquisition from State Courts. But it has not done so, as we have seen. Where are the new courts and judges sufficient for the transaction of the almost incalculable increase of business which such a far-reaching and all-embracing attempt would entail? Would not the withdrawal of all controversies in which or to which an assignee *might* be, or *become*, or be *made* a party, infinitely increase the inconveniences now suffered? What would remain of civil cognizance to State Courts if the assignee of one of a dozen litigants, in refer-

ence to title to land or the interpretation of a will, for instance, or the thousands of other issues daily tried within a given State, could draw to himself and the Federal Courts whatever questions *could* or might affect his rights? And if he did or could, would not the anomaly of Federal Judges adjudicating on State subject matter, not confided to them by the Constitution, work inconceivably more inconvenience than any chargeable to the opposite interpretation?

The judges of the several State Courts are as to each other, judges of foreign tribunals in the sense of the rules of evidence, which may be constitutionally variant in the several States; but they are citizens, by necessity, of the United States, sworn to support its constitution, and the laws made in pursuance thereof, and it is not to be supposed, any less liable to interpret such U. S. laws incidentally with uniformity than Federal appointed judges, who are, by necessity, also citizens of the States, required by the judiciary act to follow the State rules of evidence in their adjudications, and, therefore, subject to the same danger—if it be a danger—of want of uniformity in interpreting the Bankrupt Act, as the judges of State themselves. The common final tribunal of this Court, if this appeal be entertained, could assure them no greater uniformity than it would afford the State judges. Comity and reciprocity might be relied on to round and perfect the relationship. Whilst the State Courts would be found taking their rules of interpretation in proper incidental cases from the highest Federal Courts that wide divergence of opinion by Federal judges over the effect of State Statutes of Limitations on debts provable in Bankruptcy, for instance, would be gradually done away with, and the force of State laws more uniformly recognized than in the following conflicting cases:

In re Norsen, 12, N. B. R., 442.
Kingsley, 1, " 329.

Harden, 1,	"	395.
Shepherd, 1,	"	449.
Ray, 1,	"	203.
Cornwall, 1,	"	305.

3. The argument sought to be made that the *need* for an exclusive jurisdiction in Federal Courts justifies the belief that it has been satisfied by congressional intent at least, is a begging of the question. If *need*, and the better wisdom as to what need is, were to give original authority in the eyes of Courts, statutory interpretation would be subverted by varying discretion, and instead of inferring the grant of all necessary and proper incidental power, we should have judicial usurpation of legislative functions, in inferences creating the grant of original power itself, because of the presumed necessity for it. This would be to substitute the judicial for the legislative power, as is said in the Kentucky election cases: United States *v.* Reese and Fronsbee, decided in March of this year.

Sixth Point.

We come next to the question whether or not such incidental cognizance as the Court below may have taken of the Bankrupt Act, according to the claim of plaintiff in error, was an extra-judicial administration of the Bankrupt Law, as assigned in error.

The following cases hold that it is not such a cognizance as could lead to incompatible acts of administration of either the law or the bankrupt estate—the subject matter on which the law operates—or, if it were, that it has not been provided

against in the Constitution or the Bankrupt Act, and was a reserved right of the State judication.

Ward *v.* Jenkins, 10 Metc. 583.
Stevens *v.* Savings B'k, 101 Mass. 109.
Payson *v.* Dietz, 8 N. B. R. 193.
Gilbert *v.* Crawford, 46 How. Pr. 222.
Winslow *v.* Clark, 2 Lansing, 377.
Gilbert *v.* Priest, 8 N. B. R. 159, and cases cited.
Priper *v.* Harmer, 5 N. B. R., 252.
Mitchell *v.* Great Milling Co., 2 Story C. C., 668.
In re, Central Bank, 6 N. B. R. 207.
State *v.* Trustees, 5 N. B. R. 471.
Lucas *v.* Morris, 1 Paine C. C. 396.
Carr *v.* Gale, 3 Wood & Minot C.C. R. 64.
Coot *v.* Whipple, 8 AL. J. 412.

The following cases hold that U. S. Courts had not exclusive jurisdiction under the act of 1841.

Norton's Assignee *v.* Boyd, 3 How. R., 426.
Ex-parte, Christie, 3 How., 292.

And when this cause was argued below it was almost universally held by the Federal Courts that an assignee in bankruptcy could not proceed in the U. S. Courts, District or Circuit, *outside of the circuit in which the proceeding from which he took title*, to collect the estate, although all, or most of the available assets *were outside of the district.*

Jobbins *v.* Montague, 6 N. B. R., 117.
Sherman *v.* Bingham, 5 N. B. R., 34.
Marksom & Spaulding, assignee, *v.* Heaney, 4 N. B. R., 165.
Picquet *v.* Swan, 5 Mason, 35.
Toland *v.* Sprague, 12 Pet., 327.
Herndon *v.* Ridgway, 17 How, 424.
Pone *v.* Caldwell, 6 B. R., 559.
In re, Richardson, 2 N. B. R., 74.
Bump's Bankruptcy, p. 177.

Now, there was either a most mischievous oversight in Congress or an intentional omission. If it had been error, five years' experience previous to the trial below, of the necessity for its correction, would have induced further legislation. If it were intentional, the reason is at hand: outside of the particular district in which the proceeding in bankruptcy was pending State Courts were relied on to give full effect to the assignee's right of action, "not on the ground of a judicial authority con-"ferred as such, by a law of the United States, "but as ordinary jurisdiction of the State Court, "acting, indeed, in the particular case, upon legal "rights which may have been created or materially "effected by the legislation of Congress," as is said by the Supreme Court of Massachusetts, in Ward *v.* Jenkins, 10 Metcalf, p. 583. Within such district the powers of State and District Courts may be concurrent and yet leave the administration of bankrupt's assets and matter of discharge to the District Court.

If more recently the Circuit Courts have extended their interpretation of the act in some instances, it is noticeable that the amendatory act of 1874 leaves the law of 1867 *in this respect where it found it.*

The State Courts have given effect to the evident intention of Congress, acting in right of their own plenary jurisdiction, and there is only one State or Federal decision, properly understood, denying their jurisdiction, since the argument below. It indicates an attempt to supply a supposed statutory *casus omissus* (arising out of the neglect to explicitly provide Federal Tribunals to administer all the remedies of the Bankrupt Act), and the sole reason of it is obviated by an almost general assumption of jurisdiction of this nature by State

Courts, with the almost general consent of Federal Tribunals, as quoted *supra*.

Beals *v.* Quin, 101 Mass., 265.
Forbes *v.* How, 102 " , 428.
Peiper *v.* Harmer, 5 N. B. R., 252.

The Judiciary Act of 1789 reads:

"The District Courts shall also have exclusive original cognizance of all civil cases of admiralty and martime jurisdiction, &c., leaving to suitors *in all cases*, the right of a common law remedy *where the common law is competent to give it*."

It is competent to give it in this action, and the exclusion does not apply.

By the act of 1793 (20 How, N. S. R. 583), the Federal Courts are prohibited from *anticipating* the decision of a State tribunal as to its own jurisdiction. "Nor shall a writ of injunction be granted to stay proceedings in any courts of a State."

4 East R., 545., 2d Am. L. Reg. 348.
1 Penn. L. Jour., 302; 7 Cranch, 279.
4 Cranch, 179; 7 How., 625; 4 Dall, 2.

So, too, in the Judiciary Act, there is an exception that where suit is brought in favor of an assignee, there shall be no jurisdiction, unless suit *could have been brought in the Courts of the United States had no assignment been made.* This is a *restriction* on the jurisdiction confessedly conferred by the Constitution, and yet this provision has been sustained by the U. S. Supreme Court since its organization.

Sheldon *v.* Sill, 8 How. 441.
Assignee of Brainard *v.* Williams, 4 McLean, 122.

So it may be said that if jurisdiction of the assets were *exclusively* vested by the Constitution in the District or Circuit Courts, we have it decided by the highest Federal *authority, that a restriction, practically, of their jurisdiction* is not uncon-

stitutional; and that there may well be room and authority for concurrent jurisdiction in the State Courts.

The *res* or estate ready for distribution, may be exclusively in charge of the District Court, since courts cannot act on the *same thing* finally without giving way either to the other, and all powers, or *many*, to collect it, may still rest in common law courts.

Curt. Juris. & Pr. of U. S. Cts., p. 151–196.

The Constitution of the United States confers power on Congress to provide for the punishment of counterfeiting the securities and current coin of the United States, and Congress has done so; but in Fox *vs.* Ohio, 5 How. R., p. 410, it was held that passing counterfeit money might be thus punishable *in State Courts*, and that jurisdiction by Federal Courts was not exclusive.

It does not change the action because the assignee, after recovery, may settle his accounts with another Court, out of the jurisdiction.

The fund secured in the Court below may be finally distributed amongst the parties in the District Court, without the fact in any way furnishing a reason why a Court of Equity, having powers antecedent to all statutes, should *eschew* jurisdiction.

Martin *vs.* Hunter, 1 Wheaton, 304.
Teal *vs.* Fulton, 1 N. Y. 545.

The statutory method of marshalling and distributing estates is never supposed to affect an executor's or administrator's right to recover in the first instance.

By parity of reasoning an Act of Congress, as the "supreme law of the land," may well be regarded as purely supplementary, operating after assets shall have been collected, and going only to

their distribution, and not exclusively to their recovery.

U. S. *v.* Dodge, 14 John R., 95.
Bruen *v.* Ogden, 6 Halet, 370, 377, 379, 381.
Wilson *v.* McKenzie, 7 Hill, 95.
Storey on agency, §§ 319, 319a, 319b, 320, 321, 322.
Cowper 754 ; 1 Kent's Com., 386, 395.
Ripley *v.* Gelston, 9 John R., 201.
In the matter of Stacey 10, id 328.
Hoyt *v.* Gelston & Schenck, 13 id., 141.

Seventh Point.

The bankrupt act cannot be said to furnish a wholly new right ; it rather gives an additional sanction to an old one.

A claim for damages for fraud is ambulatory, and not local in its nature ; and it only needs the appearance of the parties in Court to give any Court of Equity jurisdiction of it.

Preferences by insolvents have been sustained in New York where the Court could detect nothing more harmful than superior diligence. But they have been set aside in equity whenever it could be shown that they resulted out of an agreement to "hinder, delay or defraud creditors," in the words of the Statute of Elizabeth—actual insolvency being shown here, additionally, and the gist of resulting damage, existing, admitted and liquidated, in proof. "If insolvency is once shown, or parties be "put upon inquiry as to its existence, all parties "act at their peril, when such condition actually "exists, whether known or unknown."

Colborn *v.* Proctor *et al*, 15 Gray, 38.
Curran *et al*, *v.* Munger *et al*, 6 N. B. R., p. 33.

Pringle *v.* Phillips, 5 Sands, S. C., 157.
Booth *v.* Barnum, 9 Conn., 286.
Pitney *v.* Leonard, 1 Paige, Ch. 461.
Hawley *v.* Cramer, 4 Coup. 717.

The demurrer admits *fraudulent intent in the insolvent;* knowledge of the intent on the part of the plaintiff in error—"informed and knew, and "had reasonable cause to believe" are the words—and resulting benefit from his *collusive activity to the injury of other creditors.*

"A creditor has reasonable cause to believe a "debtor who is a trader, to be insolvent, when such "a state of facts is brought to the creditors' notice "respecting the affairs and pecuniary condition of "the debtor, as would lead a prudent business "man to the conclusion that he is unable to meet "his obligations *as they mature* in the ordinary "course of business."

Toof *et al*, *v.* Martin, 6 N. B. R., 49.

The appointment of an assignee is a sufficient allegation of the existence of creditors. Their existence is necessarily implied in the allegation of his appointment.

2. Whilst Congress *omitted to legislate on this right*, the States exercised their own inherent right to legislate, showing that they denied the exclusive nature of the grant.

If it had been exclusive, it would have occurred to litigants and courts, from the adoption of the Constitution in 1789 to 1800, and from 1841 to 1867, when Congress failed to exercise it, that they were proceeding extra-judicially, and in derogation of the supreme law. So universal a disregard of the Constitution, without discovery, by State or Federal Courts, is conclusive against the pretension of an exclusive right in Congress, and the courts created by it.

Blake *v.* The Ala. & Chattanooga R.R. Co. *et al.* 6 N. B. R., 331.

If the right were exclusive in Congress, and State insolvent laws were abrogated *by its exercise*, if not by simple constitutional declaration of the power to provide a uniform system, the expiration of national bankrupt laws by limitation would have obliged the States to legislate *de novo*, the obstruction being removed, and the exercise of the right by Congress repealing their local statutes.

There is no instance of any State insolvent law being re-enacted after the lapse by limitation of national bankrupt acts; so that it may be fairly concluded all the members of the Union neither regarded the right, nor the *exercise* of the right granted to the Federal authorities, as rescinding their local statutes, or requiring a further original exercise of their inherent powers.

Eighth Point.

The State Court was not enforcing the *penal* statutes of the United States, in taking jurisdiction in this action.

The fraud was cognizable by the State Court, and was only rendered additionally unlawful, if we may say so, by the United States act, and its consequences.

Ward *v.* Jenkins, 10 Metc., p. 583.

Whilst the current of precedent shows Federal Courts can only entertain jurisdiction of crimes, &c., defined and made penal by Congress, the State Courts, as we have seen, retain their right to punish counterfeiting a currency only legally issued, and solely under a United States statute.

U. S. *v.* Hudson, 7 C. R., 32.
U. S. *v.* Coolidge, 1 Wheat., 415.
Ex parte Bollman & Swartout, 4 C. R., 95.
U. S. *v.* Lancaster, 33.

The legislation by Congress, *on like subject matter*, is therefore neither proof of exclusive jurisdiction in United States Courts, nor presumptive of the introduction of a *new* right, or a penal rather than a remedial one.

1. The withdrawl of the proceeds of recovery in fraud of other creditors cannot be called a penal proceeding where the plaintiff in error may have *pro rata* distribution, and equality as a creditor, *without a preference;* and, to that extent, is represented by defendant in error herein.

2. Nothing is penal except crimes; and the penal consequences of conspiracy to defraud under state law, or to effect a fraudulent preference under the U. S. Bankrupt Act, are wholly *distinct from* and *additional* to the consequences of the action below —simple administration of the estate, when recovered, in the District Court.

13 Encyc. Brit., p. 275.

The money sought from the plaintiff in error cannot be considered his *property*, so long as he may be turned by his fraud into a trustee to its amount; and until it shall have so become his property that this cannot happen, there is nothing penal in recovering it and satisfying other equities. But this latter is all the Court can do in holding jurisdiction; and there is nothing penal in doing so much, even if the *like result* were attained under a proceeding in the U. S. Courts.

Ct. Ass., Lawrence *v.* Bk. Republ., 31 How., 502.

Intent to defraud and damage is matter, in State law, of distinct civil or criminal treatment; and the misdemeanor element is kept distinct, as well under the Bankrupt law, and a punishment is provided in the Federal Court, on conviction, besides the simple refusal to discharge from debts (Act May 67–44).

Ninth Point.

Decisions in analogous cases support defendant's contention.

In Campbell's case, 1 Abb. N. S. R. 185, it was squarely decided by a Federal Court that it possessed no power to enjoin proceedings in a State Court, *even in bankruptcy cases*, which this was only incidentally in the State Court, but characteristically so in the Federal forum of Michigan.

In re Central Bank, N. B. R. Vol. VI. p. 207, the U. S. District Court, E. District of New York, was equally clear: "A petition was filed by a cred-"itor to restrain the assignee in bankruptcy from "prosecuting a certain action of law in the Su-"preme Court of New York State, to recover the "payment of money made contrary to the provis-"ions of the 39th section of the Bankrupt Act, "claiming to recover back the amount so paid. "HELD: That said act is the law of the State "Courts as well as of the national tribunals; and "if, by virtue of that act, the State Court has no "jurisdiction in the action brought against the pe-"titioner, it will so decide upon proper plea, and "that no reason appears to compel the assignee to "resort to the national tribunals instead of the "State."

In *Voorhies vs. Frisbie*, before the Supreme Court of Michigan, the Court, whilst intimating the power of the State Court very clearly, merely declined to exercise it, on the politic ground that the Court could not fully control *the final distribution* of the estate. If Courts deny themselves the exercise of jurisdiction for merely politic reasons, their act ceases to be authority either way. The supplementary distribution in the proceeding of the District Court in bankruptcy, could not abate a jot of the efficiency of the State Court, within the exercise of its power to *place the assignee in possession of funds*, whatever might subsequently happen to them.

The case of *Bingham* vs. *Claflin*, in the Supreme Court of Wisconsin, on demurrer, was distinguished and determined by a misapprehension already pointed out in a preceeding point. The Court held that the action was *for a penalty* under a U. S. statute, and, therefore could not be maintained in a State Court. We have shown that *equitable* distribution among creditors cannot be regarded as a penalty by Courts of Equity, whether it have assisting Federal sanction by statute, or not.

In *Backman, assignee*, vs. *Packard*, the U. S. Circuit of Oregon decided solely, that the concurrent jurisdiction of the Circuit with the District Court, under Section 2 of the Bankrupt Act, was limited to cases where the controversy is concerning the right to, or some interest in *some specific thing* between the assignee and a third person, and *does not include an action to collect a debt* This is the pith of the case, and any other remark. in the decision is surplusage.

In *Gilbert* vs. *Priest* (7 Albany L. J., 119), *Winslow* vs. *Clark* (2 Lansing, 377), and *Cook* vs. *Whipple, et al.*, the decisions also sustain the decision in this demurrer, and show that the State Courts of N. Y. are as ready and willing to exercise their jurisdiction as the Courts of Massachusetts were in the cases cited from the Massachusetts reports.

It is nothing novel for Congress to rely on State Courts to effect the object of Federal statutes. The enforcement of the Stamp Act (Law of 1868), is an instance; and the opinion of Agnew, J., in the *Charities and Robinson Township T. R. Co.* vs. *Bridge*, Sup. Ct., Pa., overcomes the reasoning in *Carpenter* vs. *Snelling*, 37 Mass. 452, and *Lawrence* vs. *Holloway*, 21 Mich. 162, and is further authority for the opinion that State Courts must be regarded as within the auxiliaries of the Federal Government when Congress omits to declare jurisdiction its own subordinate Courts exclusive.

Tenth Point.

It is not deemed necessary to notice at any length the allusions to the decisions in New York State Courts, affecting U. S. Revenue stamps on *original* process. The supreme Court of Indiana in *Warner* v. *Paul*, Rep. 4. A. M. L. R. 157, imitated them. They are not known to have been reversed for error; and the occasion for conflict, on this head, has happily passed. With the exception of a temporary clashing between the District Court in bankruptcy for the Southern District, and the Superior Court of the city and county of New York, in Clerk *v.* Binninger—(a circumstance largely induced by the unapproved conduct of a Judge, long since removed from office by the State Senate on charges having reference to *that* case,) the Courts in bankruptcy and the State Courts have *mutually* demonstrated their respect for the defined or wisely interpreted limitations of their respective and concurrent powers. If it be true, as claimed by plaintiff in error, that this writ brings up *for the first time during nine years* the question of exclusive jurisdiction, it must also be admitted that its novelty indicates a course of judicial comity highly desirable and worthy of perpetuation.

Eleventh Point.

1. The writ should be dismissed on the preliminary objections: or

2. The judgment below should be affirmed, with costs.

Of Counsel for Deft. in Error.

1 Otto

101 Minn 109

10 Met 583

102 Minn 427

2 Lansing 377